REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND

OTHER COURTS.

With Tables of the Cases and Principal Matters.

By PEREGRINE BINGHAM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. VII.

FROM MICHAELMAS TERM, 1 WILLIAM IV. 1830, TO TRINITY TERM, 1 WILLIAM IV. 1831,

BOTH INCLUSIVE.

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JUDGES

OF THE

COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL, Knt. Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir STEPHEN GASELEE, Knt.

Hon. Sir JOHN BERNARD BOSANQUET, Knt.

Hon. Sir EDWARD HALL ALDERSON, Knt.

CORRIGENDUM.

Page 428. line 3. of the marginal note from the bottom, and
Page 432. line 4. from the top, for "11 *G.* 2." read "8 *Anne. c.* 14."

A

TABLE

OF THE

NAMES OF CASES

REPORTED IN THIS VOLUME.

Chap-

Hunter,

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

AND THE VACATION PRECEDING,

In the First Year of the Reign of WILLIAM IV.

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IN THE HOUSE OF LORDS.

The KING *v.* THOMAS WESTWOOD.

(In Error.)

THIS was an information in nature of a *quo warranto*, exhibited against the Defendant in *Easter* term 1819, for usurping the office of burgess of the borough of *Chepping Wycombe*, in the county of *Buckingham*. To which the Defendant pleaded,

Where by charter, a select body in a corporation had power to make bye-laws for the good rule and government of the borough, letting of its lands, and *other matters and causes whatsoever concerning the borough;* and by the charter it was also directed, that the mayor, bailiffs, and burgesses should from time to time elect other burgesses: Held, that the general body of mayor, bailiffs, and burgesses, might make a bye-law that the burgesses should be elected by the select body.

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First, that the said borough of *Chepping Wycombe*, in the said county of *Buckingham*, from time whereof the memory of man is not to the contrary, hath been and still is an ancient borough, incorporated, and called and known by the name of the mayor, bailiffs, and burgesses of the borough of *Chepping Wycombe*, otherwise *Wicombe*, in the county of *Buckingham*; and that within the said borough, from time whereof the memory of man is not to the contrary, there hath been, and of right ought to have been, and still of right ought to be, a mayor, two bailiffs, and an indefinite number of burgesses of the said borough; of which said burgesses, during all the time aforesaid, there have been, and of right ought to have been, and still of right ought to be, twelve, sometimes called principal burgesses, sometimes capital burgesses, and for divers, to wit, 150 years past, and now called aldermen of the said borough; who, together with the bailiffs of the said borough for the time being, for all the time aforesaid, have been, and been called, and of right ought to have been, and been called, and still are and ought to be, and be called, the common council of the said borough; and to be aiding and assisting to the mayor of the said borough for the time being, in all matters and causes touching and concerning the said borough: and that, from time to time whereof the memory of man is not to the contrary, there hath been, and still is an ancient and laudable custom within the said borough, used and approved of, that is to say; that the mayor and common council of the said borough for the time being, or the major part of them, duly assembled together for that purpose within the said borough, have, from time to time, by themselves, and without the concurrence or assistance of the rest of the burgesses of the said borough, nominated and elected, and have been used and accustomed to nominate and elect, and still ought to nominate and elect,

elect, such person or persons to be a burgess or burgesses of the said borough, as to them the said mayor and common council of the said borough for the time being, or the major part of them, so assembled as aforesaid, hath seemed meet, or shall seem meet; and that every such person so nominated and elected, having been in due manner sworn in that behalf, hath been, and hath been used and accustomed to be, and still ought to be, admitted into the place and office of a burgess of the said borough, and to use and enjoy the said place and office, and all the liberties and franchises thereto belonging. And the Defendant than alleged, that he was duly elected a burgess according to that custom.

Secondly, the Defendant pleaded a similar custom; stating, by way of inducement, that the said borough of *Chepping Wycombe*, in the said county of *Buckingham*, is, and, from time whereof the memory of man is not to the contrary, hath been an ancient borough; and that the said burgesses of the said borough, from time whereof the memory of man is not to the contrary, have been, and now are, a body corporate and politic; and for a long space of time, to wit, for 150 years now last past, have been, and now are called and known by the name of the mayor, bailiffs, and burgesses of the borough of *Chepping Wycombe*, otherwise *Wicombe*, in the county of *Buckingham*.

Thirdly, the Defendant pleaded, that the said borough of *Chepping Wycombe*, in the said county of *Buckingham*, is, and, from time whereof the memory of man is not to the contrary, hath been an ancient borough; and that the burgesses of the said borough long before, and until and at the time of the granting of the letters patent of *Charles* the Second, late king of *England*, thereinafter mentioned, were one body politic and corporate, in deed, fact, and name, and called and known by the name of the mayor, bailiffs, and burgesses of the

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borough of *Chepping Wycombe*, otherwise *Wicombe*, in the county of *Buckingham*; and that within the said borough, from time whereof the memory of man is not to the contrary, there hath been, or of right ought to have been, and still of right ought to be, an indefinite number of burgesses of the said borough: and that long before any of the days and times in the said information mentioned, to wit, on the 16th day of *November*, in the *fifteenth* year of the reign of his said late Majesty King *Charles* the Second, the said King *Charles* the Second, by his letters patent, under the great seal of *England*, bearing date at *Westminster*, the day and year last aforesaid, for himself and his successors, did, amongst other things, grant, ordain, constitute, and confirm to the said mayor, bailiffs, and burgesses of the borough aforesaid, that from thenceforth for ever there might and should be within the borough aforesaid, one of the most honest and discreet burgesses of the borough aforesaid, to be elected in manner thereunder in the said letters patent mentioned, who should be and be named *mayor* of the borough aforesaid; and that in like manner there might be and should be, within the same borough, *two* honest and discreet burgesses of the borough aforesaid, who should be and be named *bailiffs* of the borough aforesaid; and the said late king willed, and thereby for himself, his heirs and successors, did grant, ordain, and confirm, that from thenceforth for ever there might and should be, within the borough aforesaid, from time to time, *twelve* honest and discreet men, continually inhabiting and residing within the said borough, who should be, and should be called, *aldermen* of the said borough: *and that the* MAYOR, BAILIFFS, *and* BURGESSES *of the same borough, and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the borough aforesaid, as and*

and which to them should seem most expedient, to be burgesses of the said borough. And the said late king further willed, and thereby for himself, his heirs and successors, did grant and confirm to the aforesaid mayor, bailiffs, and burgesses of the borough aforesaid, and their successors, that the aforesaid *aldermen and bailiffs* of the borough aforesaid, and their successors, should be, and be called the *common council* of the said borough; and should be, from time to time, assisting and aiding to the mayor of the said borough of *Chepping Wycombe*, otherwise *Wicombe*, aforesaid, for the time being, in all matters and causes touching and concerning the borough aforesaid. And the said late king further willed, and did thereby, for himself, his heirs and successors, grant and confirm to the aforesaid mayor, bailiffs, and burgesses of the borough aforesaid, and their successors, that the *mayor, aldermen, and bailiffs* of the borough aforesaid, and their successors, for the time being, or the major part of them, (of whom the mayor for the time being, the said late king willed to be one,) might and should have full power and authority to frame, constitute, ordain, and make, from time to time, such reasonable laws, statutes, and ordinances whatsoever, as to them should seem to be good, wholesome, useful, honest, and necessary, according to their sound discretions, for the good rule and government of the burgesses, artificers, and inhabitants of the borough aforesaid, for the time being; and for declaring in what manner and order the aforesaid mayor, aldermen, bailiffs, and burgesses, and the artificers, inhabitants, and residents of the borough aforesaid, should behave, conduct, and carry themselves in their offices, mysteries, and business, within the same borough, and the limits thereof, for the time being; and otherwise, for the further good and public advantage and rule of the same borough, and the victualling of the same borough; and also for the better preservation, government, disposition, letting,

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demising of lands, tenements, possessions, revenues, and hereditaments, to the aforesaid mayor, bailiffs, and burgesses, and their successors, by the said letters patent or otherwise given, granted, assigned, or confirmed, or thereafter to be given, granted, or assigned; *and other matters and causes whatsoever, touching or in anywise concerning the aforesaid borough, or the state, right, and interest of the said borough.* And the said late king did thereby constitute and appoint one person therein named to be the first and present *mayor* of the said borough; two other persons therein named to be the first and present *bailiffs* of the said borough; and twelve other persons therein named to be the twelve first and present *aldermen* of the said borough: and his said late majesty King *Charles* the Second, by his said letters patent, for himself, his heirs and successors, further granted and confirmed, that the aforesaid *mayor, aldermen, bailiffs, and burgesses* of the borough aforesaid, for the time being, or the major part of them, from time to time for ever thereafter, might and should have power and authority yearly and every year, on the *Thursday* next before the feast of *St. Michael the Archangel*, to assemble themselves, or the major part of them, in the *Guildhall* of the borough aforesaid, or in any other convenient place within the borough, to be limited and assigned according to their discretions, and there to continue until they, *or the major part of them* there then assembled, should then elect and nominate one of the aldermen of the borough aforesaid to be mayor of the borough aforesaid for one whole year then next ensuing; and that then and there they should and might be able to elect and nominate, before they should from thence depart, one of the aldermen of the borough aforesaid for the time being, who should be *mayor* of the borough aforesaid for one whole year then next ensuing; and that he, after he should be so as aforesaid elected and nominated to be mayor of the borough aforesaid,

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said, and before he should be admitted to execute the same office, should take a corporal oath, upon the Holy Gospel of God, yearly, on the day of election, if he should be then present, and if he should be absent, then within one month then next ensuing after the said day of election, before the *mayor*, his last predecessor, or, in his absence, before such *aldermen* of the borough aforesaid for the time being, and the rest of the *burgesses* of the borough aforesaid, who should be then present in the *Guildhall* of the borough aforesaid, or in any other convenient place within the borough aforesaid, to be limited and assigned according to their discretions, rightly, well, and faithfully to execute the same office in all things touching the same office. And his late majesty King *Charles* the Second, by his said letters patent, for himself, his heirs and successors, granted and confirmed to the aforesaid Mayor, bailiffs, and burgesses of the borough aforesaid and their successors, that the *mayor, aldermen, and bailiffs* of the borough aforesaid for the time being, or the major part of them, from time to time for ever thereafter, might and should have power and authority yearly and every year, on *Thursday* next before the feast of the *Annunciation of the Blessed Virgin Mary*, to assemble themselves, or the major part of them, in the *Guildhall* of the borough aforesaid, or in any other convenient place within the borough aforesaid, to be limited and assigned according to their discretion, and there to continue until they, or the major part of them there then assembled, should elect and nominate two burgesses of the borough aforesaid to be *bailiffs* of the borough aforesaid for one year then next ensuing, to be elected and nominated in form following: that they should and might be able there to elect and nominate, before they should from thence depart, two of the aforesaid burgesses, who from thenceforth should be *bailiffs* of the borough aforesaid for one whole year then next

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ensuing: and that they, after they should be so as aforesaid elected and nominated to be bailiffs of the borough aforesaid, before they should be admitted to execute the same office, and each of them, should take a corporal oath upon the Holy Gospel of God yearly, on the same day of election, if they should be present, and if they should be absent, then within one month then next ensuing the day of election aforesaid, before the *mayor* of the borough aforesaid, or, in the absence of the said mayor, before the *bailiffs*, their last predecessors, or either of them, in the presence of such of the aforesaid *aldermen* of the borough aforesaid for the time being, and the rest of the *burgesses* of the borough aforesaid as should be then present in the *Guildhall* of the borough aforesaid, or in any other convenient place within the borough aforesaid, to be limited and assigned according to their discretion, rightly, well, and faithfully to execute the same office of bailiffs of the same borough, in all things touching the same office. And his said late majesty King *Charles* the Second, by his said letters patent, for himself, his heirs and successors, further granted to the said mayor, bailiffs, and burgesses of the borough aforesaid, that if any or either of the *aldermen* of the borough aforesaid should die, or be removed from his office, (which said aldermen, and every or any of them, not well behaving themselves in the same office, his said late majesty willed to be removable at the pleasure of the mayor of the borough aforesaid, and the major part of the aforesaid aldermen of the same borough for the time being,) that then the *mayor*, and such of the residue of the *aldermen* of the borough aforesaid who should be assembled in the *Guildhall* of the borough aforesaid, or in any other convenient place within the borough aforesaid, to be limited and assigned according to their discretions, or the major part of them so assembled, at the pleasure of the mayor, and the residue of the aldermen of the same borough, should and might be able to elect and

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and prefer one or more of the best and most honest *burgesses* of the borough aforesaid, in the place or places of the same alderman or aldermen of the borough aforesaid so dead, or removed from his or their office or offices, to supply the aforesaid number of twelve aldermen of the same borough. Which said letters patent afterwards, to wit, on the 17th day of *November*, in the fifteenth year of the reign of King *Charles* the Second, were duly accepted by the then mayor, bailiffs, and burgesses of the said borough.

And that afterwards, and after the granting and acceptance of the said letters patent, and long before the days and times in the said information mentioned, to wit, on the 1st day of *December* in the year of our Lord 1675, the then *mayor*, *bailiffs*, *and burgesses* of the said borough, being in due manner met and assembled for that purpose within the said borough, did then and there duly make, constitute, ordain, and establish a certain ordinance or bye-law, (not now extant in writing,) *for the better rule and government of the said borough, touching and concerning the election of the burgesses of the said borough* for the time then to come, in order to avoid popular confusion and disorder in such elections; by which said ordinance or bye-law, it was ordained and established in manner following, (that is to say,) that, from thenceforth *the mayor and common council* of the said borough, or the major part of them duly assembled together for that purpose within the said borough, should and might from time to time and at all times thereafter, *by themselves, and without the concurrence or assistance of the rest of the burgesses of the said borough*, elect and choose such person or persons to be a *burgess* or *burgesses* of the same borough, as to them the said *mayor and common council* of the said borough for the time being, or the major part of them so assembled as aforesaid, should seem meet; and which said ordinance

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ordinance or bye-law hath, ever since the making thereof hitherto, been constantly kept and observed by the said mayor, bailiffs, and burgesses of the said borough, and is still in full force and virtue, and in no wise annulled, abrogated, abolished, revoked, or repealed. The plea then stated, that the Defendant was duly elected a burgess, according to the said ordinance or bye-law.

To the first and second pleas, there were several general replications, putting in issue the facts stated therein; and then a special replication to those pleas, setting out the charter of *Charles* the Second, as in the third plea, whereby it was granted, ordained, and confirmed, that the *mayor, bailiffs, and burgesses* of the said borough, and their successors, *or the major part of them*, from time to time, for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the borough aforesaid, as and which to them should seem most expedient, to be *burgesses* of the said borough; and also setting out a clause in the charter, respecting the appointment of a *recorder* of the said borough: which said letters patent afterwards, to wit, on the said 17th day of *November*, in the fifteenth year of the reign of King *Charles* the Second, were duly accepted by the then mayor, bailiffs, and burgesses of the said borough; and that, under and by virtue of the said letters patent, the *burgesses* of the said borough, continually from and after the granting thereof, hitherto have been eligible, and of right ought to have been elected, and still of right ought to be elected, from time to time, by the *mayor, bailiffs, and burgesses at large*, of the said borough, *or the major part of them*, and not otherwise.

To the third plea, there was a general demurrer, and joinder in demurrer.

To the special replication to the first and second pleas, the Defendant, after praying that the charter might be enrolled,

enrolled, in which there appeared to be a general confirmation of all the liberties, franchises, immunities, privileges, &c. before vested in the corporation, rejoined, that the said letters patent were not duly accepted by the then mayor, bailiffs, and burgesses of the said borough, as to that part thereof whereby his said late Majesty, King *Charles* the Second, did will and ordain that the mayor, bailiffs, and burgesses of the same borough, and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many and such other men inhabiting or not inhabiting within the said borough, as and which to them should seem most expedient, to be burgesses of the said borough, as by the said replication is supposed.

To this rejoinder there was a demurrer, for the following causes: that the Defendant hath not, in or by his said last-mentioned rejoinder, stated or set forth any charter or letters patent, or other matter of record, dispensing with the total acceptance of the said letters patent, in the said last-mentioned replication mentioned and set forth by the mayor, bailiffs, and burgesses of the said borough; and authorising or enabling them not to accept the said last-mentioned letters patent, as to that part thereof whereby his said late Majesty, King *Charles* the Second, did will and ordain that the mayor, bailiffs, and burgesses of the same borough, and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the said borough, as and which to them should seem most expedient, to be burgesses of the said borough; and also, for that the Defendant hath not, in or by his said last-mentioned rejoinder, denied, or confessed and avoided, the allegation in the said last-mentioned replication, that the said letters patent therein mentioned were duly accepted by the then mayor, bailiffs, and burgesses of the said

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said borough; and also, for that the Defendant hath, in and by his last-mentioned rejoinder, stated and alleged the supposed partial acceptance of the said last-mentioned letters patent, as a matter of fact, triable by the country, instead of stating and setting out therein, as he ought to have done, the charter, letters patent, or other matter of record, if any, authorising such supposed partial acceptance, with a *prout patet per recordum*, and concluding his said last-mentioned rejoinder with a verification by the record.

The Defendant having joined in demurrer, the Court of King's Bench, after two solemn arguments, in *Michaelmas* term 1823, and *Michaelmas* term 1824, gave judgment for the crown, in *Michaelmas* term 1825, on the first and second pleas; being unanimously of opinion, that a charter granted by the crown to a corporation, cannot be partially accepted, whether it be a charter of creation, or granted to a pre-existing corporation. On the demurrer to the third plea, the Chief Justice intimated, that he had very considerable doubt, whether the corporation at large had power to make the bye-law stated in that plea; and Mr. Justice *Bayley* was decidedly of opinion, that the bye-law was invalid: but the other Judges being of a different opinion on that point, judgment was given for the Defendant on the third plea.

On this judgment a writ of error was brought to the House of Lords; and it was argued that the bye-law, stated in the third plea, was invalid, and that the judgment ought to be reversed, as to that plea, for the following, amongst other reasons:

That the power of making bye-laws being vested by the charter exclusively in the *select* body of *mayor, aldermen, and bailiffs* of the borough; the corporation *at large*, consisting of the *mayor, aldermen, bailiffs, and burgesses*, were not authorised to make the bye-law stated

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in the third plea; nor any bye-law whatever, "touching or in anywise concerning the borough, or the state, right, and interest of the same."

That the corporation at large, if it had such power, yet, having accepted the charter, by which it was declared, that the *mayor*, *bailiffs*, *and burgesses* of the borough, and their successors, *or the major part of them*, should have the election of *burgesses* of the said borough, could have no right to make the above bye-law; by which the election of *burgesses* was transferred to the *mayor and common council*, without the concurrence or assistance of the rest of the *burgesses* of the said borough, in direct contravention of one of the most important constitutions of the borough expressed by the charter.

That the above bye-law is unreasonable, and alters the mode of election prescribed by the charter, and excludes the burgesses at large, (being an *integral* part of the corporation,) from voting at the election of burgesses.

That this bye-law not only varies the constitution of the borough, but has a direct tendency to keep the number of common burgesses below the number of the common council.

That, for any thing which appears to the contrary, the bye-law in question might originally have been made by the concurrence of an actual *minority* of the common burgesses, with the common council; and may, ever since, have been continued against the votes of the *majority* of the same body.

That none of the cases cited in support of the bye-law, (except that of *Rex* v. *Bird* (*a*), which is distinguishable from the present,) go further than to limit the number of *electors*, upon the election of officers of the corporation; whereas this bye-law has a direct tendency

(*a*) *13 East*, 367.

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to limit the number, which are to constitute the *corporation* itself.

The Defendant prayed that the judgment of the court below might be affirmed, for the following (amongst other) reasons: —

Because there is a general power inherent in the corporation at large, to make bye-laws, which is not taken away by the grant of that power in particular cases to a select body: nothing is taken away by the charter from the body at large except that which is given to the select body; and the power of making bye-laws or regulations for the election of burgesses is not so given, and consequently remains in the whole corporation. *Sutton's Hospital.* (*a*)

Because the bye-law in question was valid and legal, inasmuch as it was only a delegation of the power of election made by the corporation at large; that is, by the mayor, bailiffs, and burgesses, to a part of themselves, viz. the mayor, bailiffs, and aldermen; the aldermen, who, together with the bailiffs, constitute the common council, being still burgesses, consequently this bye-law, which limits the number of electors, is not liable to the objection, that it is made by a select body, or that it strikes off an integral part of the corporation. *Case of Corporations* (*b*), *Corporation of Colchester.* (*c*)

Because no distinction, it is conceived, exists in principle, or is to be found in the decided cases between bye-laws, the object of which is to regulate the election of corporate officers, and those which regulate the election of burgesses. If the number of electors is legally restrained, the object of the election is immaterial. (*d*)

(*a*) 10 *Rep.* 31. 1 *Roll. Abr.* 513. *Corporation*, pl. 5.
(*b*) 4 *Rep.* 776.
(*c*) 3 *Bulst.* 71.
(*d*) 4 *B.* & *C.* 833.

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The Defendant also contended that he was entitled to judgment on the demurrer to the rejoinder to the replication to the first and second pleas.

Because the charter of King *Charles* the Second might be partially accepted, and consequently the body corporate might legally act under its authority, with the exception of that part which gives the mayor, bailiffs, and burgesses the power of election. *Rex* v. *Vice-Chancellor of Cambridge.* (*a*)

Because the charter of *Charles* the Second gave to the mayor, bailiffs, and burgesses the power to elect burgesses, and the usage exercised, both before and since the charter, in the election of burgesses by the mayor, aldermen, and bailiffs, or the mayor and common council, as set forth in the first and second pleas, is consistent with the express language of the charter, the mayor, aldermen, and bailiffs, being, in fact, mayor, bailiffs, and burgesses, and the language mayor, bailiffs, and burgesses being only used as descriptive of the corporate name.

Because this being a charter of confirmation, the ancient usage of the borough, for the mayor and common council only to elect, which is a mode of exercising that right by the corporation at large, is not superseded.

The opinion of the Judges was then requested upon the following question: — Whether the bye-law contained in the third plea was a legal and valid bye-law, regard being had to the terms of the charter of the borough of *Chepping Wycombe?*

Having taken time to consider, they delivered their opinions *seriatim* on *Tuesday* the 16th of *February* 1830, and on *Wednesday, July* 21, following, Lord *Tenterden* delivered the final judgment of the House of Lords.

(*a*) 3 *Burr.* 1647.

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J. PARKE J. The question which your Lordships have been pleased to state for the opinion of the Judges, may be conveniently divided into two branches; and I propose to consider first, Whether this bye-law would have been good if the charter of *Charles* II. mentioned in the pleadings, had given no power of making bye-laws to the select body: and, secondly, Whether the provisions of that charter in this respect, destroy the power of making this bye-law, which the corporation at large would otherwise have possessed.

It is a legal incident to every corporation to have the power of making bye-laws, regulations, or ordinances, relative to the purposes for which such corporation is instituted: and that power is *primâ facie* to be exercised by the body at large. *Sutton's Hospital case* (*a*), *Corporation of Feltmakers* v. *Davis.* (*b*) The body at large, therefore, must in this case be taken to have originally possessed that power: and it is stated in the plea, to which your Lordships' question refers, that the mayor, bailiffs, and burgesses at large being duly assembled, made, for the better rule and government of the borough, an ordinance or bye-law, by which it was provided, "That the mayor and common councilmen of the borough, or the major part of them, should by themselves, and without the concurrence or assistance of the rest of the burgesses, elect such persons to be burgesses as to them should seem meet." The first part of the question relates to the legality and validity of this bye-law.

It was decided in the Case of *Corporations* (*c*), by all the Judges of *England*, after great deliberation, That the body at large of a corporation having a power to make laws, ordinances, and constitutions for the better government and order of their boroughs, may, for avoid-

(*a*) 10 *Rep.* 31 *b.* (*b*) 1 *B.* & *P.* 100. (*c*) 4 *Rep.* 77 *b.*

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ing popular confusion, by their common assent, constitute and ordain, that the mayor or other principal officers shall be elected by a selected number of the principal of the commonalty or burgesses; and such ordinance and constitution was resolved to be good and allowable, and agreeable with their law and their charters for avoiding of popular disorders and confusion.

The same doctrine is established and supported by all the subsequent decisions from that period to the present time. In the case of the *Corporation of Colchester* (*a*), it was held, that by a bye-law, by the common consent of all, elections of corporate officers might be made by fewer numbers. The same doctrine is laid down by Mr. Justice *Eyres* in the *King* v. *Larwood* (*b*), by Lord *Hardwicke* in *Rex* v. *Tomlyn* (*c*); and was admitted in the *Maidstone* cases, *Rex* v. *Spencer* (*d*), *Rex* v. *Cutbush*. (*e*) The two cases of *Rex* v. *Ashwell* (*g*), and *Rex* v. *Bird* (*h*), are authorities to the same effect, and fully establish the legality of a bye-law by the body at large, limiting the exercise of the power of election to a part of the burgesses themselves.

It must, therefore, be considered as a settled rule of law, that the whole body may, by such a bye-law, delegate the right of election of corporate officers to a part of themselves. It would be dangerous to the peace and security of many corporations to break in upon this rule.

But it is said there is a difference between elections of corporate officers, who are of a definite number, and whose places are merely to be filled up; and of burgesses, whose number is indefinite; and that the bye-

(*a*) 3 *Bulst.* 71.
(*b*) *Comb.* 316.
(*c*) *Cas. Temp. Hardw.* 316.
(*d*) 3 *Burr.* 1827.
(*e*) 4 *Burr.* 2204.
(*g*) 12 *East*, 22.
(*h*) 13 *East*, 367.

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law, though reasonable in the former, is in the latter case unreasonable. That its tendency is to diminish the number of burgesses, and keep it below that of the common council, and thus vary the constitution of the borough.

I do not, however, think that it is the *necessary* consequence of such a bye-law, that the number of burgesses will be diminished. It may or may not happen that the part to which the power is delegated will limit the number of ordinary freemen; if they do so improperly, it is in the power of the majority to repeal the bye-law, and put a stop to the mischief: and it may be observed, that there is as much chance at least that the burgesses at large, if there were no bye-law, would, in order to make the franchise of each more valuable, permit the number of ordinary freemen to be reduced. Further, in the case of the *King* v. *Bird*, it was held by the Court of King's Bench, that the rule was as much applicable to the election of common burgesses, as of the higher officers of the corporation. It has been said, indeed, that the bye-law for the election of burgesses might be good in that case, as the same mischief would not result from it; because by the constitution of the particular borough in question in that case, (*Nottingham*), persons had inchoate rights by birth and servitude, and these persons were sufficient to provide for the succession in the corporation; but that circumstance makes no difference, as it seems to me, in the *principle* of the bye-law, it only diminishes the *degree* of mischief arising from its adoption. If it be bad, where the only supply is by the election of the burgesses, because it has a tendency to diminish that supply, it must be bad for the same reason, if that be *one* of the sources, for it tends to diminish it. It is equally mischievous in its *principle*, and equally a violation of the spirit

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spirit of the constitution of the borough, if it improperly affects *any* means provided by that constitution, for the continuance of the succession of members. My opinion, therefore, is, that a bye-law, by the burgesses at large, delegating the right of election to a select number of themselves, is *as* valid in point of law, where it relates to the election of freemen, as to that of officers; and that it makes no difference, whether the election of freemen be the *only* means of continuing the corporation or not.

The remaining consideration upon this branch of the question is, Whether the persons on whom the bye-law in the present case confers the right of election, are a part of the burgesses at large, so as to bring this case within the rule laid down? The bye-law confers it on the mayor and common council, that is, the mayor, bailiffs, and twelve aldermen; all these officers are taken mediately or immediately from the burgesses, and in consideration of law, still continue burgesses. The aldermen, when elected, are still burgesses, though they are also clothed with additional authority, and have in their character of aldermen, functions which common burgesses do not possess. In the meeting of the whole body they are burgesses only; if they are absent, the proceedings are valid; and if present, they act and vote as burgesses only. A delegation, therefore, of this authority to the common council, is a delegation to the mayor, bailiffs, and twelve burgesses, or, in other words, to a part of the burgesses at large. The bye-law in question is, for these reasons, in my opinion, legal and valid, if the body at large had, at the time it was made, a power to make it.

The second branch of the question is, Whether the provisions of the charter of *Charles* II. destroy the power of making this bye-law, which the burgesses at

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large would otherwise have possessed? This is a point of more doubt than the former; but, on the best consideration I have been able to give, my opinion is, that since the acceptance of that charter, no other persons than the select body could make bye-laws, at least bye-laws relative to election, and, consequently, that the burgesses at large were not competent to make this.

The power of making bye-laws is *incident* to a corporation; that is, when the crown creates a corporation, it grants to it, by implication, all powers that are *necessary* for carrying into effect the objects for which it is created, and securing a perpetuity of succession: upon the legal principle which is expressed in the maxim, — "*Qui concedit aliquid concedere videtur et id, sine quo res ipsa esse non potest.*" A discretionary power somewhere to make minor regulations, usually called bye-laws, in order to effect the objects of the charter, is *necessary*, and is, therefore, impliedly granted by the crown; and if no select body is appointed to exercise it, this discretionary power must be in the body corporate at large. But though it is *necessary* that there should be a power to make bye-laws, it is not necessary that there should be a power *to make any particular bye-law*; still less to make *this bye-law, or any one of a like nature*, delegating the power of election from all to a part. Such a bye-law is reasonable, and, therefore, valid; but it is not *essential or necessary* to a corporation that it should be made, or that there should be in that corporation a power to make it. When it is considered that the burgesses at large, instead of delegating the authority to elect to the higher classes of the body corporate, might give it to three or four, or some other definite number of the lowest order of freemen exclusively, will it be said that a power to make such a regulation is *essential* and *necessary* to the existence of a corporation? There

There are many corporations which exist, and are carried on without it, and I cannot see any reason why it should be so considered.

If, then, such a power be not essential and necessary, it would not exist by necessary implication in the body at large of the corporation which the crown should create for *the first time*, where, by the charter, it expressly gives a power to a select body to make bye-laws *generally* without restriction; and in such a charter the express power given to a select body to make bye-laws would be inconsistent with a power to make bye-laws in the body at large: for there could not be two bodies in the same corporation, alike authorised to make regulations, otherwise it would be impossible for those who owed obedience to them to know which of the two should be obeyed. This affirmative power, therefore, in such a case, would, in legal language, tell the implied power incident to the corporation; in other words, no power in the corporation at large would pass by implication by the king's grant.

I concede that the select body would have no right to make this ordinance, or any other of the same nature, by which the common burgesses would be deprived of their right of voting given by the charter to them, upon the principle laid down in the *Maidstone* cases to which I have referred; but, unless it is *essential* and *necessary*, to a corporation that a bye-law of that nature should be made, or that there should be a power to make it, it does not follow that the whole body would have it; and as I think I have shewn that it is not *essential* and *necessary*, the whole body would not have it.

And if the general body of burgesses would not possess this power in a corporation newly erected by such a charter giving an unlimited power to make bye-laws, on the above ground; if this affirmative power in such

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case implies a negative of all others; it follows, that if a prescriptive or existing corporation accept a charter containing such a provision, the power already belonging to the entire corporation would cease; for it would be just as inconsistent in this as in the other supposed case, that there should be two bodies at the same time in the same corporation possessing the same power.

It is this inconsistency, or implied negative, which appears to me to distinguish the present case from those which have been cited in argument at your Lordships' bar, and in the court below. In the case referred to from 1 *Roll. Abr.* 513. (*Corporations*), a clause in a charter declaring it to be lawful for the mayor and aldermen, on a vacancy of the office of alderman, to elect another within eight days, is not inconsistent with a power to elect at any time, and such a power is incidental to a corporation; that is, it is necessary it should exist, in order to carry the purposes of the charter into effect. So in *Rex* v. *Bird*, the right given affirmatively by prescription to apprentices to be admitted burgesses, was not inconsistent with, and, therefore, did not destroy the implied right in the corporation to continue itself by election: and in *Haddock*'s case (*a*), the charter contained no provision inconsistent with the prior existing right in the corporation, to remove officers for misconduct, and therefore, such right remained.

For the position I have laid down there is the authority of Lord *Mansfield* in the *King* v. *Head* (*b*), who states, "that the body at large had no power to make bye-laws, because that power was by the charter given to the common council, consisting of the mayor and aldermen; and the common council could not, by a

(*a*) Sir *T. Raym.* 435. (*b*) 4 *Burr.* 2515.

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bye-law, take away from the body at large the right of election which the charter had vested in the whole body." It is true, that the case was decided on another point, but the opinion there given appears to me to be founded on the clearest principles.

For these reasons, I conclude, that if a new charter, giving to a particular body the power of making bye-laws generally, be accepted by an existing corporation, it takes away the right of making such bye-laws which it previously possessed.

But if the new charter gives only the power to the select body of making them in *certain particular cases*, or on certain particular subjects, it takes away the right in those particular cases and on those particular subjects only; but it does take away from the whole body the power of legislation on those subjects with respect to which it gives the power to a part.

The question then resolves itself into this: Whether the charter referred to does give to the common council the right to make bye-laws *in all cases*, and on all subjects, or in all cases touching *election of burgesses*, or on the subject of election of burgesses (for the reasoning would in that case be precisely the same), or in certain particular cases, and on certain subjects, not including these elections. This is a question of *construction*, and, like all cases of the same nature, different minds may form different opinions. It appears to me, however, upon the best consideration I have been able to bestow, that the crown meant by that charter to give a general power as to all corporate matters, elections included, to the select body; at all events, a power to make bye-laws on the subject of election of burgesses.

The words of the charter are these: — "And further, we will, and by these presents for us, our heirs and successors, grant to the aforesaid mayor, bailiffs, and bur-

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gesses of the borough aforesaid, and their successors, that the mayor, bailiffs, and twelve capital burgesses aforesaid, and their successors for the time being, or the major part of them (of whom the mayor for the time being we will to be one), may and shall have full power and authority to frame, constitute, ordain, and make such reasonable laws, statutes, and ordinances whatsoever, as to them shall seem to be good, wholesome, useful, honest, and necessary, according to their sound discretions, for the good rule and government of the burgesses, artificers, and inhabitants of the borough aforesaid for the time being, and for declaring in what manner and order the aforesaid mayor, bailiffs, and burgesses, and the artificers, inhabitants, and residents of the borough aforesaid, shall have, carry, and use themselves in their offices, mysteries, and business within the same borough and the limits thereof for the time being; and otherwise for the farther good and public utility and rule of the same borough, and the victualling of the same borough, and also for the better preservation, government, disposition, letting, demising of lands, tenements, possessions, revenues, and hereditaments to the aforesaid mayor, bailiffs, and burgesses, and their successors, by these presents or otherwise given, granted, assigned, or confirmed, or hereafter to be given, granted, assigned, and other things and causes whatsoever touching or in anywise concerning the borough aforesaid, or the state, right, and interest of the same borough."

The charter appears to contain an entire scheme of government for the borough.

This provision gives a power to regulate persons, *not members* of the corporation; such as the artificers, and inhabitants, and residents in the borough; and to make regulations touching other than corporate matters, as victualling of the borough; and for that purpose express provisions

provisions were necessary, as none such could be implied or authorised by the general words; and that consideration accounts for the introduction of these subjects by name.

The provision also gives expressly what otherwise would have been incident to the corporation at large, a power to regulate the lands of the body; and perhaps the particular mention of this subject was made to remove all doubts whether the general words which are used would have been sufficient. But the mention of these particulars appears to me in no way to control or affect the construction of the other very large and comprehensive words used by the charter; and I cannot help thinking that the crown certainly meant to authorise the select body to make bye-laws generally, relative to the corporation, or, at least, relative to the corporate character and duties of burgesses, in making elections of burgesses and corporate officers.

The clause in question empowers this body to make laws, statutes, and ordinances "for the good rule and government of the burgesses for the time being, and for declaring in what manner and order the burgesses should behave, conduct, and carry themselves in their offices, and otherwise for the further good and public advantage and rule of the same borough." I own it appears to me very difficult to say that regulations for the conduct of the corporation itself and its members in all cases, are not authorised by these words; for the corporation is created expressly for the better government, rule, and improvement of the borough; and whatever ordinances are made for the good conduct and efficiency of the ruling body, may, in a sense, be considered as made for the good and public advantage and rule of the borough. But can there be any reasonable doubt that these large words authorise an ordinance regulating

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regulating the mode of corporate elections? Is not such an ordinance one "for the good rule and government of the burgesses, and for the public advantage and rule of the borough?" In the Case of *Corporations*, Lord *Coke* expressly says, that a bye-law similar to that in this case may be made where, by their charters, the body at large "have power given them to make laws, ordinances, and constitutions for the better government and order of their cities or boroughs;" and the very bye-law in the third plea is stated in the pleadings to be made "for the better rule and government of the borough touching and concerning the election of burgesses for the said borough." Besides, it is by no means clear that the words which give power to make statutes, declaring in what manner the burgesses should conduct themselves in their offices, do not give power to make a bye-law directing them how they were to conduct themselves in that part of their office which relates to the election of new burgesses. At all events, I am satisfied that all such regulations would be authorised by the concluding general words, which give a power to make laws in "other matters and causes whatsoever, touching or in anywise concerning the aforesaid borough, and the state, right, and interest of the same borough;" for it is, as I think, impossible to say that a regulation of the governing body does not touch and concern the borough and its state and interest.

If the select body then have a power to make regulations generally, or regulations touching elections, it is clear, if I am right in the reasons before given, that the body at large have none.

In order to try the question of the construction of the language of the charter in this respect, let us suppose that a bye-law was made by the common council, ordering that elections of burgesses should be made in the town

town hall after a week's notice, and that the names of the candidates should be previously published, in order that their characters and qualifications might be enquired into; and let us further suppose, that the only question was as to the validity of such a bye-law, would any doubt be entertained by any court that the words of the charter authorise the select body to make such a bye-law? If it be clear that they do, it is equally clear that the same body, by the same words, has a power to make all reasonable bye-laws on that subject, and it follows that the burgesses at large have none.

For these reasons I am of opinion, that after the acceptance of the charter of *Charles* the Second, the body at large which did make, had no power to make, any bye-law on the subject of election, consequently not the bye-law in question, and, therefore, that the bye-law is illegal and invalid.

VAUGHAN B. The question proposed by your Lordships is, Whether the bye-law contained in the third plea is a legal and valid bye-law? It appears to me, that having regard to the mode in which a bye-law is authorised to be made by this corporation in that plea mentioned, as well as to the object of the bye-law in question, it is not a legal and valid bye-law. In considering the validity of this bye-law, there are two questions that present themselves: first, whether the body at large had authority, consistently with the terms of the charter, to make any bye-law? Secondly, admitting their authority, Whether the making this bye-law, the object and purpose of which was to delegate the power of electing burgesses (which by the charter is given to the body at large), to the mayor and common council only, so as to make the election by the mayor, bailiffs, and aldermen, of the same validity as an election by

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by the mayor, bailiffs, and burgesses at large, was a legal act or not? Although, I think there can be no doubt that the body at large had no power to make the bye-law, of the validity of which we are called upon to give our opinion; yet, as the form of the question proposed to us by your Lordships respects both points, I shall therefore address myself to the consideration of them.

The objection which presents itself to my mind, and which I have not been able to overcome, is, that the power of making bye-laws is by the terms of this charter itself not vested in the body at large. At common law all corporations, whether existing by charter or by prescription, are the creatures of his Majesty, and every corporation has a power incident to it, of making reasonable bye-laws for its order and government; and if the charter confers no express direction on the subject, that power must be considered, in judgment of law, as residing in the body at large.

Several cases may be referred to upon that point, but one will be found, *Rolle's Abr.* 513., title *Corporations* (G), where it is said, if the king create a corporation of a mayor and eight aldermen, and do not give an express power of electing another his place, yet the power of election is incident to the corporation, and they may elect another to the vacancy. Corporations are at all times subject to the laws of the realm, and are subordinate to them. This position is further confirmed in the case of the city of *London* v. *Vanacker*.(a) In addition to the authority of my Lord *Raymond*, the same principle will be found recognised by a series of other authorities, which it is not necessary to mention in detail; so that in every corporation there is vested by implication, the power of making such bye-laws as are found

(a) 1 *Ld. Raym.* 496.

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requisite for managing and ordering the borough. Considering, therefore, this point, the conclusion to which my mind arrives, after much time and careful consideration, is, that wherever a charter confers an express power of making bye-laws, as to a particular subject, on a certain part of the corporation, (more especially where, as in this case, those terms are very *general and comprehensive*,) there is no ground on which a presumption can be raised of an implied power existing in the body at large; but that such power is expressly taken from that body, according to the rule, *expressum facit cessare tacitum*. I think this conclusion is founded on reason and authority.

It is not to be forgotten, in construing a charter, that a charter is an emanation from the grace and favour of the crown, and is always to be considered as expressing the intention of the royal will; and when a corporation have once accepted a charter, they are to be considered, by adopting the form of government therein described, as pledging themselves to execute the will of the crown in all the terms and conditions of the charter as far as they are consistent with the law; and that it was competent to the crown, if it so pleased, to have limited the power to the common council or the select body, wholly excluding the interference of the burgesses at large.

Now regard being had to the charter itself, it must be observed, that there are many large and extensive terms in which this power of making bye-laws is given for the maintenance, order, and good government of the borough; that power is not confined to a particular object, or to be exercised only on particular occasions, but generally, without any saving, only that it is to be not repugnant to the laws of the realm. It is sufficiently comprehensive to embrace every subject on which the select body could make a bye-law for the benefit and government of the borough in all matters and causes what-

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whatsoever touching or in any way concerning the said borough, or the state, right, and interest of the same.'

By the construction contended for as to the bye-law there would be an anomaly, for there might be two distinct bodies in the same corporation making bye-laws on the same subject.

The select body have the power of making reasonable regulations for the purpose of *discussing* and *voting*, and for imposing fines for the non-attendance of members. If the body at large had the power of making bye-laws to reduce the number of electors, they might also have the power of regulating the mode of election, and much inconvenience might arise from the clashing of these authorities. It is said that the power of making such a bye-law as that under discussion must be vested somewhere; that the select body cannot exercise it; and that the consequence of its not being exercisable by the select body is, that it still remains in the body at large. Admitting the bye-law in question to be necessary, I could not dissent from such an opinion, nor deny that the power of making a necessary bye-law must rest somewhere. I agree that whatever is necessary for the maintenance and keeping alive the corporation, and continuing and securing the due succession of its members, if not expressly secured by the charter, must, by implication of law, remain as incident to the general power in the corporation at large. If necessity compels, necessity must excuse.

But it ought to be remembered, that in deciding against the validity of this bye-law, on the ground of want of authority in the body at large who made it, your Lordships will enforce one of the most important injunctions of the charter, namely, the continuing the election of burgesses by the mayor, bailiffs, and burgesses at large, and will act in literal accordance with the express terms of it.

I have

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I have not discovered in the researches of counsel at the bar, or in the elaborate judgments delivered in the Court below, any authority to justify and confirm the validity of a bye-law made under similar circumstances. I think that, as far as they bear on the question, they tend to a contrary conclusion. In proof of this I would refer your Lordships to the case of the *King* v. *Head*. (*a*) That, your Lordships know, was an information for the usurpation of the office of burgess; the defendant justified under a bye-law made by the mayor and aldermen, *with the assent of the commonalty*, to avoid popular confusion. The mayor and aldermen by themselves without the commonalty, elected a burgess. By the charter of Queen *Elizabeth*, the power of making bye-laws was given to the mayor and aldermen, as a *common council*, and the power of electing burgesses to the mayor, aldermen, and *commonalty*. In giving judgment, Lord *Mansfield* observed, "The body at large had no power to make bye-laws, because that power is by the charter given to the common council, consisting of the mayor and aldermen, and the common council could not by a bye-law take away from the body at large the right of election, which the charter had vested in the whole body." But this opinion of Lord *Mansfield* is considered by one of the learned Judges in the Court below as altogether extra-judicial, and unnecessary for the decision of the case, which he has determined on other grounds; namely, that the bye-law was not made by the body at large, but by the mayor and aldermen only, though with the assent of the commonalty. But with great respect for the opinion of that very able Judge, I cannot consider the opinion of Lord *Mansfield* as extra-judicial, but as a judgment called for by the argument of counsel on the point in contest between the

(*a*) 4 *Burr.* 2515.

parties.

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parties. The point to be determined was, Whether a bye-law so made was a valid bye-law? The bye-law to have been good, should have been made by the mayor and aldermen, as a common council. It was virtually a bye-law of the whole body. But it was also invalid as narrowing the right of election, and I mention this case as a strong authority to shew, that notwithstanding the power of making bye-laws is given to a portion of the select body, they cannot take the power of electing burgesses from the body at large and transfer it to themselves. They did not for that purpose represent the whole of the commonalty; it was an abuse of the charter, and it was usurping the power of electing burgesses without authority.

But here the whole corporation clearly could not make bye-laws, for the power of making these is given to the select body. Lord *Macclesfield*, in the case of *Child* v. *The Hudson's Bay Company* (*a*), confirms the same principle, when he says, "a corporation has an implied power to make bye-laws; but where the charter gives the company a power to make bye-laws, they can only make them in such cases as they are enabled to do by the charter; for such power given by the charter implies a negative, that they shall not make bye-laws in any other cases."

These authorities, and the principle to be deduced from them, apply to the present case, in which we are called on to give our opinion on the construction of the charter, upon which I have so far made up my mind as to say that, with regard to this bye-law, the charter gave no authority to the body at large to make it.

Under this impression, I shall spare your Lordships the fatigue of hearing many observations as to the next question, namely, Whether, supposing the body at large

(*a*) 2 *P. Wms.* 207.

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to have the power of making bye-laws, this particular one (regard being had to its objects) is valid? I have in support of the affirmative of this proposition, very shortly to trouble you. There are certain rules and certain authorities in the books on corporation law, from which it is clear that a corporation cannot make bye-laws contrary to the spirit of the charter; and, if they do, they act without authority; and the reason of the rule is clear, for by so doing they may narrow the number of electors, which is contrary to the intention of the crown in granting a charter, the object being to perpetuate the corporation. These points seem to have been considered and settled beyond all doubt in almost every corporation case that has come under discussion for more than a century past. The application of these principles to the particular case before your Lordships gives rise, however, to considerable difficulty when we are desired to consider the question as to the object and purpose of this bye-law. It must be acknowledged that its direct object and purpose is to reduce the number of electors; and if so, and conceding that the effect of the bye-law is confined solely to the *reduction of a portion of the class of electors*, and that if it went no further it might be legal, yet it is further insisted, as an objection, that the tendency of this bye-law is to exclude an *integral* part of the corporation from their choice in elections, namely, the burgesses, who by the constitution and government of the borough have the right of election. In order to determine the weight of this objection, I will refer your Lordships shortly to the charter and the bye-law. It appears by the facts stated in the third plea, that the charter was granted to the ancient corporation, and that the right of election was vested in an indefinite number of burgesses. In whom the power of making bye-laws vested under the ancient

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corporation, whether in the body at large or the select body, does not appear; nor is it, in my view of the case, material to enquire. Wherever it was vested, the corporation consented to accept the charter of *Charles* the Second, and take their direction, as to the government and making of bye-laws, from what was expressed on the face of it. By this charter the body of the corporation at large consisted of the mayor, bailiffs, and burgesses, incorporated by the name of the mayor, bailiffs, and burgesses. — It is to be observed in this part of the argument, that, for certain purposes, the mayor, bailiffs, and aldermen are still to be considered as distinct individual members of an entire corporation, their character of burgess not being merged or extinguished in the higher office. — The election of burgesses by the charter is in the *whole body corporate*, the *individual* members of which are to act as *members of the whole*; that is, as burgesses, and not as *members of any integral part*. The bye-law in question narrows and restrains the exercise of that right, making the election to be by a *particular* part of the same class of electors instead of the *whole*. The bye-law applies to so many as for the time being hold the office of mayor, bailiffs, and aldermen. An election, under this bye-law, is made by the mayor, bailiffs, and aldermen, on the part of the whole body corporate; and that this may legally be done appears from the authority of the Case of *Corporations* (*a*), the *Colchester* case (*b*), and many other cases, which have been decided in affirmance of the same principle. These cases have been referred to by men of great learning on the subject of corporations; they have been confirmed by experience, and are now sanctified by time. It is alleged they do not

(*a*) 4 *Rep.* 77. (*b*) 3 *Bulst.* 71.

relate

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relate to the election of *burgesses at large*, but I am at a loss to conjecture on what ground the objection is made. I see no reason why the principle of the case of *Corporations* should not be as applicable to the election of *burgesses at large*, as to the higher officers of the corporation.

This principle was recognised by *Holt* C. J. in *The King* v. *Tomlyn*. (*a*) In *The King* v. *Ashwell* (*b*) it is true, the right of election of aldermen was by the charter given to the mayor and burgesses, and they made a bye-law restricting the right of election to the mayor and a select number of the burgesses. On the face of this bye-law, it being confined to the election of aldermen, it may be said to fall within the case of *corporations*, as it related to the election of principal officers. But in *The King* v. *Bird* (*c*), the right of election being given to the whole body corporate of mayor, aldermen, and burgesses, the mayor and burgesses made a bye-law to restrain the number of electors to the mayor, aldermen, and eighteen burgesses there mentioned. The bye-law was decided by Lord *Ellenborough*, and the whole Court, to be a valid bye-law. I have not found any decision whatever which impugns that doctrine. There are, indeed, the doubts of Lord *Kenyon*, incidentally advanced in *The King* v. *Holland* (*d*) on the doctrine in the Case of *Corporations*; but he never went so far as to pronounce such a bye-law invalid, and his doubts were in the nature of a protestation, and no more: he appears to have reserved the right of retaining his judgment unfettered, until the actual question should arise. In *Newling* v. *Francis* (*e*), where one question was, as to the right of electing an officer, that is, the mayor, where the election was

(*a*) *Cas. temp. Hardw.* 316.
(*b*) 12 *East*, 22.
(*c*) 13 *East*, 367.
(*d*) 2 *East*, 70.
(*e*) 3 *T. R.* 189.

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not regulated by the charter of the corporation, a bye-law was made to regulate it. And Lord *Kenyon* says, "The special verdict states that there is no prescriptive mode of election; it is therefore necessary to resort to the bye-law which has regulated the election. For, if the bye-law does not exclude those persons who were intended by the king's charter to concur in the election, or does not narrow the number of persons eligible, it may be good. A bye-law cannot, indeed, exclude integral parts, as was decided in the *Maidstone* case; but, generally speaking, within these bounds the mode of election may be regulated by provident bye-laws. Now in the corporation of *Cambridge* there was no other standard previous to the charter of *Charles* II.; and if, prior to that time the bye-laws of the corporation were competent to regulate the mode of election, they continue so at this time, unless some alteration in this respect was made by the charter. If that charter has regulated the mode of election, and is the subsisting charter now, the corporation must conform to it." If this is the only way in which the opinion of Lord *Kenyon* could be called doubtful, with respect to the propriety of a bye-law to restrain the number of electors, I cannot allow that any of the judgments delivered by him, during the whole period he presided in the Court of King's Bench, either bear directly or remotely on the questions under your Lordships' consideration. Nor can it be fairly said, that in any respect has he ever expressed a decided opinion, that, supposing the body at large had the undisputed power of making bye-laws, it might not legally have been done. It is, however, true, that the doubts expressed by Lord *Kenyon* were considered by Lord *Ellenborough* as resting on no authority (*a*), and there certainly seems, in direct

(*a*) 13 *East*, 379.

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contradiction to those doubts, a number of decisions in affirmance of the Case of *Corporations*, continuing down to the present period.

Upon the whole, therefore, my Lords, I am of opinion that if the charter had not conferred on the select body the express power of making bye-laws, but had given it to the body at large, or had made no provision on the subject, it would have belonged to the mayor, bailiffs, burgesses in their corporate character; and under these circumstances, the bye-law stated on the record, regard being had to the objects of it, would have been a legal and valid bye-law; but the power having been expressly given by the charter to the select body, in most general and extensive terms, to make bye-laws, the presumption of any such implied power existing in the body at large is effectually taken away; and, therefore, this bye-law is invalid.

GASELEE J. My Lords, the question which your Lordships have been pleased to put to the Judges in this case is, Whether the alleged bye-law stated in the third plea is a legal and valid bye-law, having regard as well to the power of making bye-laws in the corporation in that plea mentioned, as to the object and provision of that bye-law.

This question subdivides itself into two: First, Whether, inasmuch as the charter in question invests a select body of the corporation with the power of making bye-laws in certain cases, the body at large can make any bye-law at all. Secondly, If they can, whether the bye-law in question, which it is agreed could not be made by the select body, could be made by the body at large, and is a legal and valid bye-law?

It is clear that a power to make bye-laws is incident to a corporation, and that it is unnecessary to stat such power either in the charter or in pleading.

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If it were necessary to cite any authorities on this part of the case, I would refer your Lordships to the case of *Sutton's Hospital* (*a*), where it is laid down, "That when a corporation is duly created, all other incidents are *tacitè* annexed." Amongst those incidents is stated to be, "to make *ordinances* that is requisite for the good order and government of the poor, &c. but not to the essence of the incorporation."

And in a modern case—*The Company of Feltmakers* v. *Davis* (*b*),—it is said by the Court, "The power of making bye-laws is incident to every corporation, either by the body at large or by a select part of it; and it is in the latter case only that the power need be shewn."

In the case of *The King* v. *Lyme Regis* (*c*), where an objection was taken that the return did not set out a power of amotion, which is also incident to the body at large, Lord *Mansfield* said, "They have set out the charter, and there is no special power thereby given either to the whole body, or to any select part." In that case, the charter making them a corporation, the law implies the right to remove to be in the whole body. And *Buller* J. said, "As to the great question, Whether it was necessary to state that the power of amotion was in the body at large, it has been admitted that it is by law incident to the whole body, if not restrained by an express grant to a select part."

It being admitted that a power to make bye-laws is incident to the body at large where it is not by express words restrained to a select part, I should not have troubled your Lordships with these authorities, had I not elsewhere heard it objected, that the plea in this case was bad in not alleging that before the granting the

(*a*) 10 *Rep.* 31 *b.* (*b*) 1 *B. & P.* 100. (*c*) *Doug.* 158.

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charter in question, either the body at large or any select party had the right.

Whether that objection will or will not be urged to-day, it is impossible for me to say; should it be so, it seems that the above authorities are an answer to that objection, and that it will be taken for granted the power is in the body at large, unless the contrary is shewn. It is observable too, on this point, that in the two cases of the town of *Nottingham* hereinafter cited, viz. *The King* v. *Ashwell*, and *The King* v. *Bird*, no power of making bye-laws is stated in the pleadings, and the bye-laws were made by the body at large.

But it is said, that, inasmuch as in the charter in question there is a power to a select part of the corporation to make bye-laws, the power is wholly taken away from the body at large, and that they are incompetent to make any bye-law. It appears to me, however, that this consequence does not necessarily follow. As far as the special power extends, it *pro tanto* restrains and takes away the general power; but I am of opinion, that the general power remains as to those cases to which the special power does not extend.

In the case of *The King* v. *Head* (*a*), Lord *Mansfield* indeed says, "The body at large had no power to make bye-laws, because that power is by the charter given to the common council, to the mayor and aldermen; and the common council could not, by a bye-law, take away from the body at large the right of election which the charter had vested in the whole body.

The first part of that observation appears to have been unnecessary to the determination of the case, which was decided on another ground, viz. that the bye-law was not made by the body at large, but only by the mayor

(*a*) 4 *Burr.* 2515.

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and aldermen, *with the assent of the commonalty*, which latter words make no difference, as it was held, the commonalty could not be assembled to assent; and it was considered as the bye-law of the mayor and aldermen only: and the bye-law was wholly insupportable, as it struck out an integral body of the electors. In the case of *Hicks* v. *The Borough of Launceston* (*a*) it is determined, that if the king create a corporation of a *mayor and eight aldermen*, with a clause in the patent, that upon the death or amotion of an alderman it shall be lawful to the mayor and other aldermen, *within eight days next after such death or amotion*, to elect another alderman in his place, although no election be made within eight days after the death, yet they may elect an alderman at any time afterwards, for they have power to elect another as incident to the corporation created; for ancient corporations have no such clause giving power to elect; and this affirmative power does not take away the implied power incident to the corporation.

But it is said, that the words of the power given to the select body is sufficient to answer all the purposes for which bye-laws can be made, and, consequently, that there is nothing left upon which the body at large can act.

Although the words of the power in this charter granted to the select body are very large, they do not seem to me to give any authority to make bye-laws or ordinances respecting the elections of officers or members of the corporation; and it has been frequently decided, that a select body cannot make a bye-law transferring the right of election from the body at large to themselves. This must be done by the body at large, or not at all.

(*a*) 1 *Roll. Abr.* 513.

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The first authority upon this point is the case of the *Corporation of Colchester* (*a*), where the whole Court held, "that if there be a popular election of mayor and aldermen in corporation towns, and that happens to create a confusion amongst them, this may be altered by their agreement, and by the *common consent of all* to have their elections made by a fewer number, *but not otherwise.* But if, by their charter, they are to be elected by them all, then this is not to be altered, but by and with the general assent of the whole town; and so by this means to take away confusion."

So in *The King* v. *Spencer* (*b*), the charter of *Maidstone* directs the nomination and election of common councilmen to be by the *mayor, jurats, and commonalty.*

The mayor, jurats, and common council, who are empowered to make bye-laws, made a bye-law reciting the power given by the charter for the mayor, jurats, and commonalty to elect common councilmen; and that the commonalty were very numerous, and their admission to vote on the election of common council occasioned riots; and therefore enacting, that the elections in future should be made by the mayor, jurats, and common council, and such of the common freemen who should reside in and had served certain offices in the town, without the concurrence of any of the commonalty. The Court held the bye-law bad for this, amongst other reasons, that the select body authorised to make bye-laws ought not to take the power of election from others and place it in themselves.

A similar determination was come to in the case of *The King* v. *Cutbush* (*c*), upon another bye-law made by the same body after their defeat in *The King* v. *Spencer.*

(*a*) 3 *Bulst.* 71. note by *Coke* C.J.
(*b*) 3 *Burr.* 1827. (*c*) 4 *Burr.* 2204.

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Upon that occasion the Court said, it is made by a part of the corporation to deprive the rest without their consent. Mr. Justice *Yates* says, "A bye-law made by a part of the corporation to exclude the rest without their assent is not good." The same point was decided in the case of *The King* v. *Head* above cited.

The only remaining head of enquiry is, Whether the bye-law is legal and valid in regard to the object and provision of the said bye-law.

Before entering upon this enquiry it will perhaps be desirable to call the attention of your Lordships to the terms and object of the bye-law, which appears to have been made by the body at large, and not by a part of it only.

It is made for the better rule and government of the borough, touching and concerning the election of the burgesses of the said borough for the time then to come, in order to avoid popular confusion and disorder in such elections. It ordains "that from thenceforth the mayor and common council of the borough, or the major part of them, duly assembled together for that purpose within this borough, shall and may from time to time, and at all times thereafter, by themselves, without the concurrence or assistance of the rest of the burgesses of the said borough, elect and choose such persons to be a burgess or burgesses of the same borough, as to them the said mayor and common council of the said borough for the time being, or the major part of them so assembled, shall seem meet."

The professed object of the bye-law is the avoiding of popular confusion in the elections. Is this a legitimate object?

Upon this point, in addition to the authority before cited of the *Corporation of Colchester* I would refer your

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your Lordships to the Case of *Corporations* (*a*), in which it was resolved by all the Justices, upon great deliberation and conference had between themselves, that the ancient and usual elections by certain selected members of the principal of the commonalty or burgesses, commonly called the common council, or by such like name, and not in general by the whole commonalty or burgesses; although by the words of the charter the election should be indefinitely by the commonalty or by the burgesses, which is as much as to say by all the commonalty or all the burgesses, &c., were good and well warranted by the charters and by the law also; for in every of their charters they have power given to them to make laws, ordinances, and constitutions for the better government and order of their cities or boroughs, &c. By force of which, and for *avoiding of popular confusion*, they may by their common assent constitute and ordain, that the mayor or bailiffs, or other principal officers, shall be elected by a selected number of the principal of the commonalty or of the burgesses as aforesaid, and prescribe also how such selected number shall be chosen; and such ordinance and constitution was resolved to be good and allowable, and agreeable with the law and their charters, for avoiding of popular disorder and confusion. And Lord *Coke* adds, "According to this resolution, the ancient and continual usages have been in *London*, *Norwich*, and other ancient cities and corporations; and *God forbid* that they should be now innovated or altered, for many and great inconveniences will thereupon arise, all which the law has now prevented, as appears by this resolution."

The same points were also decided in *The King* v.

(*a*) 4 *Rep.* 77 *b.*

Larwood,

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Larwood, sheriff of Norwich (*a*), and *The King* v. *Tomlyn and Others, jurats of Maidstone* (*b*), upon the authority of the above case in *Coke*.

The next case with which I shall trouble your Lordships is that of *The King* v. *Ashwell*. (*c*) This case is so similar to the present, that I feel myself called upon to state the particulars of it somewhat at length. It was an information against the defendant, calling upon him to shew by what authority he used and exercised the office of an alderman of *Nottingham*.

The plea stated that the town of *Nottingham* was a corporation by prescription, and there was an indefinite number of burgesses. That King *Henry* VI. by his charter confirmed to the burgesses to be a corporation, by the name of the mayor and burgesses. That the burgesses should have, in the place of two bailiffs of the town, two sheriffs, to be chosen from themselves in manner therein mentioned. That the same burgesses and their heirs might from time to time elect from themselves seven aldermen, for life, of whom one to be mayor. That on the death or amotion of any alderman, the mayor and burgesses should elect one other burgess from themselves into the office of alderman. That the charter was accepted.

It then stated that, after such acceptance, viz. on the 1st of *May* 1577, the then mayor and burgesses duly made a certain reasonable bye-law, not then extant in writing, *for the avoiding popular confusion and tumult in the election of aldermen*, whereby it was ordained, that upon the death, departure, or amotion of any of the aldermen, "the mayor, and certain of the burgesses of the town, viz. the recorder, aldermen, coroners, common council-

(*a*) *Comb.* 316. (*b*) *Cas. temp. Hardw.* 316.
(*c*) 12 *East*, 22.

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men, and such of the burgesses of that town as had served or did serve the office of chamberlain or sheriff of the said town, and called the livery or cloathing burgesses for the time being, or so many of them as should be duly assembled for that purpose, whereof the mayor for the time being to be one, or the major part of them, by themselves, and without the concurrence and assistance of the rest of the burgesses, should elect one other burgess from the other burgesses of the said town to be one of the aldermen," &c.

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After verdict found for the Defendant, a rule was obtained calling upon him to shew cause why judgment of ouster should not be entered against him, notwithstanding such verdict, founded upon an objection that the bye-law stated in the Defendant's plea was unreasonable; and, therefore, an invalid bye-law as taking the right of election of aldermen from the burgesses at large, and confining it to a select body which did not even require the attendance of the majority of the integral part of the corporation to constitute the elective assembly. But this objection was over-ruled by the whole Court. Lord *Ellenborough* says, " We are called upon to pronounce this bye-law to be void, as unreasonable, because it restrains the right of electing aldermen to a select body, which before was possessed and exercised by the body at large; and, therefore, it is argued that it affords a greater chance than before of the entire non-attendance of the electors, or at least that there needs only the attendance of the mayor and one other, or perhaps two other burgesses, in order to constitute a good election under it, and that the chance of so small an attendance is greater under the restricted power of election given by the bye-law, than under the extended right conferred by the charter. But in order to avoid a bye-law upon the ground of its being unreasonable, because of some

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some inconvenience that may result from it, it should appear to be a *probable* inconvenience: for one can hardly predicate of any law that some *possible* inconvenience may not result from it: but is it likely to happen? Now this bye-law has existed for 230 years; and during all this time, if any inconvenience had resulted from it, it was competent to the corporation, by the same authority which enacted, to have repealed it. But the long continuance of a bye-law, though it would not legalize it if it were in itself illegal, is fair evidence to shew that there is no intrinsic inconvenience in it; at least, the acquiescence of the corporation in it for above two centuries is a fair answer to any theoretical argument of inconvenience; especially, when it is considered that they might have delivered themselves from it if it existed at all, at any hour of that long period, by repealing the bye-law." And Mr. Justice *Grose* says, it has been settled since the Case of *Corporations*, that a bye-law made for the purpose of narrowing the number of electors is valid: the reason for which is in order to prevent popular confusion and tumult in elections, and an excellent reason it is.

Mr. Justice *Bayley* said, "But I see nothing unreasonable in this bye-law; it does not give the right of election to those who had no right before: it does not dispense with the attendance of any persons whom the charter expressly requires to attend; but, merely to avoid popular confusion, the corporation made a bye-law, that the election of aldermen should be made by a certain description of their own body. And this bye-law only operates upon the body at large so long as they think fit to continue it: it is liable to be reconsidered by them at all times: it only binds their successors so long as the successors choose to be bound by it: for the same body that made the bye-law may repeal it. Then,

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the circumstance that for nearly 240 years no inconvenience has been found to result from it, is a strong argument that no inconvenience is likely to result from it, and therefore, to shew that it is not unreasonable."

Upon comparing the charter of *Nottingham* with that in the present case, they will appear very nearly to correspond as to the point now under consideration.

The corporation is by prescription by the name of mayor, bailiffs, and burgesses. There has been immemorially an indefinite number of burgesses.

The charter directs, that there should be one of the most honest and discreet burgesses to be mayor to be sworn in before the last mayor, or, in his absence, before the aldermen and the rest of the burgesses present; two honest and discreet burgesses to be bailiffs; and twelve discreet men to be continually residing in the borough, who shall be called aldermen.

The aldermen as well as the bailiffs are to be elected out of the burgesses. None of them after being elected bailiff or alderman cease to be burgesses; they are still burgesses.

No integral part of the body is excluded: no new body is introduced. The exercise of the power of election is narrowed to a part of the burgesses themselves, viz. the mayor, bailiffs, and aldermen, who have become so out of the general body of the burgesses.

But it has been said, that in all or most of all the cases which have been hitherto cited, the bye-law is for regulating the elections of an officer, or of persons who must of necessity fill specific offices; and that it is a very different thing whether a bye-law is to say who shall fill that specific office, when that specific office must be filled by somebody, and a bye-law that shall vest in a select body, not the power of saying who shall fill the office, but of saying if the indefinite body shall consist

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sist of five, ten, fifty, five hundred, or any other number. On two occasions, viz. in *The King* v. *Ginever* (*a*), and in *The King* v. *Holland* (*b*), doubts are thrown out by Lord *Kenyon*. But in *The King* v. *Bird* Lord *Ellenborough* says that no authority was referred to by Lord *Kenyon* for the doubt expressed by him, and that all decided cases were the other way.

It seems to me, however, that there is no sufficient ground for this distinction; that the probability of tumults and confusion is at least equally great in a popular election of the one kind as of the other; and in *The King* v. *Bird* (*c*), which was an information against the defendant for claiming the office of a burgess of the town of *Nottingham*, this distinction was urged, but the Court immediately decided against it.

It is, however, further objected, that in the case of *The King* v. *Bird*, the election of burgesses was not the only supply of common burgesses: the eldest son of every burgess born in *Nottingham*, the younger son of a freeman serving an apprenticeship, whether in *Nottingham* or not, and whether he were a burgess or not, and every person serving a seven years' apprenticeship in *Nottingham* to a freeman, was entitled at twenty-one to his freedom; and that is stated fully to secure and provide for the succession of a sufficiently large number of burgesses without the addition of burgesses by elections. And it is also objected, that in this case the bye-law has a direct tendency to keep the number of common burgesses low. That the select body have an interest to keep the number of common burgesses smaller than their own number, and thereby to prevent the bye-law from ever being repealed.

To this I answer in the words of Lord *Ellenborough* in *The King* v. *Ashwell*: "In order to avoid a bye-law

(*a*) 6 *T. R.* 732. (*b*) 2 *East*, 70. (*c*) 13 *East*, 367.

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upon the ground of its being unreasonable, because of some inconvenience that may result from it, it should appear to be a *probable* inconvenience, for one can hardly predicate of any law that some *possible* inconvenience may not result from it; but is it likely to happen? Now this bye-law has existed for above 230 years, and during all this time, if any inconvenience had resulted from it, it was competent to the corporation, by the same authority which enacted, to have repealed it. But the long continuance of a bye-law, though it would not legalize it if it were in itself illegal, is fair evidence to shew that there is no intrinsic inconvenience in it: at least the acquiescence of the corporation in it for above two centuries, is a fair answer to any theoretical argument of inconvenience; especially when it is considered that they might have relieved themselves from the inconvenience, if it existed at all, at any hour of that long period, by repealing the bye-law."

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I would also say that it by no means follows, that that which is suggested to be a possible or probable inconvenience resulting from this bye-law, viz. that of keeping the number of common burgesses below that of the select body, would in fact be an inconvenience. There is no duty to be performed by the common burgesses; the charter requires no particular number of them. All that is necessary to be done for the good government of the corporation is to be done by the select body, whose number is limited. Whenever there is a vacancy in that body, they may immediately elect a sufficient number of common burgesses, from whence the vacancies may be supplied, or may be compelled by *mandamus* to do so; and with respect to the supposed apprehension that the select body may prevent there being a sufficient number to repeal the bye-law, the same effect may be produced by the mayor, who is always one of the select body, declining to call any meeting for the election

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of common burgesses, except when he shall think it proper.

Upon these grounds, my humble answer to the question proposed by your Lordships is, that the alleged bye-law stated in the third plea is a legal and valid bye-law, having regard, as well to the power of making bye-laws in the corporation in that plea mentioned, as to the object and provisions of that bye-law.

LITTLEDALE J. On the first part of your Lordships' question, as to the power of this corporation to make bye-laws, I shall consider,

First, What are the general powers of corporations to make bye-laws, independent of the special provisions in any particular charter; and next I shall apply what I consider the law on the subject to the provisions of this particular charter.

There can be no doubt but that, generally speaking, a corporation has a power to make bye-laws. When a corporation is duly created, all other incidents are tacitly annexed. In the case of *Sutton's Hospital* (*a*), Lord *Coke*, in alluding to the particular charter, says that divers clauses subsequent in the charter are not of necessity, but only declaratory, and might have been left out; and then, in enumerating what these are, it is said in the eighth article, "To make ordinances, that is requisite for the good order and government of the poor, &c., but not to the essence of the corporation."

In 1 *Roll. Abr.* 513. pl. 4. it is laid down, If the king creates a corporation and does not give any express power in the letters patent to make laws, yet this power is incident to the corporation and included in their incorporation: but these cases ought always to be subject to the laws of the realm, as subordinate thereto; for a body po-

(*a*) 10 *Rep.* 30 *b.*

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litic cannot be governed without laws; and he cites *Hobart's Rep.* 285. And *Hobart* C. J., in *Norris* v. *Staps* (*a*), says, "Now I am of opinion that this power to make laws is given by special clause in all corporations, yet it is needless: for I hold it to be included by law in the very act of incorporating, as is also the power to sell, to purchase, and the like: for as reason is given to the natural body for the governing of it, so the body corporate must have laws as a politic reason to govern it; but those laws must ever be subject to the general law of the realm as subordinate to it. And, therefore, though there be no proviso for that purpose, the law supplies it. And if the king in his letters patents of incorporation do make ordinances of himself as here it was, yet they are also subject to the same rule of law." And in *The City of London* v. *Vanacker* (*b*) *Holt* C. J. says, "We are of opinion that this privilege of making bye-laws and ordinances is vested in the city by common right if not by custom, for that it concerns the good, and better government of the city; and every city and town corporate may, by an essential power incident to their constitution, make bye-laws for the government of that body politic: and this is the true touchstone of all bye-laws, which ought to be for the administration of the government with which they are intrusted." And then he goes on to cite what *Hobart* C. J. says in *Norris* v. *Staps*. In the report of the same case in Lord *Raymond* (*c*) *Holt* C. J. says, "Admitting that the custom could not warrant such a bye-law, yet it might be made of common right; for of common right every corporation may make a bye-law concerning any franchise granted to them, because it concerns the welfare of the body politick, and is (as *Hobart* C. J. says) included

(*a*) *Hob.* 211.
(*b*) 5 *Mod.* 438. 1 *Ld. Raym.* 496.
(*c*) 1 *Ld. Raym.* 496.

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in the very act of incorporation." "And then if a franchise be granted to a corporation, it is under a trust that the corporation shall manage it well, which cannot be done but by a bye-law." The same case is to be found in other old reporters.

This then being the general law as to corporations, it is to be seen how far that is altered if there be a charter which gives power to a select body of the corporation to make bye-laws.

If there be a general power given to a select body to make bye-laws in all cases whatsoever, there can be no doubt but the right which is incident to the body at large is taken away; because the crown can grant a charter upon any terms that is thought proper; and it would be impossible in many cases for the corporation to go on, if there were a concurrent power in two bodies to make bye-laws on the same subject.

But if the power given to the select body to make bye-laws only extends to some particular cases, then it may be questioned whether the general power which the body at large has, is altogether taken away by the power given to the select body, or whether this is only an abridgment *pro tanto* of the power of the body at large, and so as that they retain their power in all cases except in those where the select body have the power, and that that which is untouched of their power remains as it was. And, in my opinion, the power is only taken away in those cases to which the right of the select body extends.

The law says, that the power is incident to the corporation that they may be well governed. This well governing must be taken to extend to any subject which comes to be acted upon.

It seems to me to be quite obvious that it cannot be a legal ground for the construction of charters, that because they give power to a select body as to some of the objects

objects of the corporation, the body at large are to lose their power as to the others.

There may be many reasons why in particular cases the power to make bye-laws should be taken from the body at large and given to a select body; but such reasons ought only to be considered as applicable to the particular cases.

Why are the body at large to lose the power altogether, because in some particular cases it is thought proper they should not have the power? It may be absolutely necessary that bye-laws should be made as to those other matters; and as it is quite clear that the select body cannot go beyond the powers intrusted to them, the consequence would be, that if the body at large cannot make bye-laws, nobody can do so; and then many regulations, which are almost necessary for the good order and government of the corporation, would be prevented from being made, and nothing be done upon them. In the case, indeed, of *Child* v. *Hudson's Bay Company* (*a*), Lord *Macclesfield*, then Lord Chancellor, says, "A corporation has an implied power to make bye-laws; but where the charter gives the company a power to make bye-laws, they can only make them in such cases as they are enabled to do by the charter; for such power given by the charter implies a negative; that they shall not make bye-laws in any other cases.

"Thus, where the company in the principal case have a power given them by the charter to make bye-laws for the management of their trade to *Hudson's Bay*, this power implies a negative; that they cannot make any other bye-laws."

Upon this case it is to be observed, that it was a corporation established for a particular purpose, and the bye-law they made was out of the purpose for which

(*a*) 2 *P. Wms.* 208.

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they were incorporated, and, therefore, they could not make such a bye-law.

Besides which, what is said by Lord *Macclesfield* applies to a case where the body at large had an express power given to make bye-laws; and whether this proposition be correct or not it is not now material to consider: but this is the case of a select body who have no implied power as incident to their body; and the question is, Whether the power given to a select body is to take away the power of the whole body as to matters with which the select body have nothing to do?

In the case of the *King* v. *Head* (*a*), Lord *Mansfield* says (*b*), "The body at large have no power to make bye-laws, because that power is by the charter given to the common council, consisting of the mayor and aldermen: and the common council could not, by a bye-law, take away from the body at large the right of election which the charter had vested in the whole body."

The first part of what Lord *Mansfield* there says was extra-judicial, and in no way necessary to the decision of the case: the power of the body at large did not come in question, for the bye-law was not made by the body at large, but by the common council with the assent of the commonalty; but the assent of the commonalty did not make them a party to making the bye-law in a corporate character; and there the bye-law was bad in every way.

Perhaps, also, what Lord *Mansfield* said may not be considered as being contrary to the principle I am now stating; for there is no doubt but that if a charter gives a power to the common council to make bye-laws, the body at large cannot do it; that is, they cannot in those cases where the common council can, which may be all that Lord *Mansfield* meant: but the point did not arise

(*a*) 4 *Burr.* 2515. (*b*) 4 *Burr.* 2521.

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which I am now endeavouring to illustrate; that is, whether, if the select body have only a partial power, the body at large can do it in those cases to which the power of the select body does not extend. These two cases then of *Child* v. *Hudson's Bay Company*, and *The King* v. *Head*, do not establish the contrary of my proposition.

Supposing that I am well founded in the opinion I have before given, it is then to be considered how far that proposition is applicable to the charter of this corporation.

This corporation appears by the third plea, and is so admitted, to have been an ancient borough, and to have had from time immemorial an indefinite number of burgesses; and in the sixteenth year of *Charles* II. a charter was granted by that king to this corporation, by the name of the mayor, bailiffs, and burgesses of the borough of *Chepping Wycombe*, in the county of *Bucks*, which charter they accepted.

By that charter there are a mayor, two bailiffs, and twelve aldermen nominated and appointed; and then the charter directs, "that the mayor, bailiffs, and burgesses of the same borough and their successors, or the major part of them, from time to time, for ever, should and might be able to elect so many and such other men, inhabiting or not inhabiting within the borough aforesaid, as and which to them should seem most expedient, to be burgesses of the said borough. And the said late king further willed, and thereby for himself, his heirs and successors, did grant and confirm to the aforesaid mayor, bailiffs, and burgesses of the borough aforesaid, and their successors, that the aforesaid aldermen and bailiffs of the borough aforesaid, and their successors, should be, and be called, the common council of the said borough, and should be from time to time assisting and aiding to the mayor of the said

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borough of *Chepping Wycombe*, otherwise *Wicombe* aforesaid, for the time being, in all matters and causes touching and concerning the borough aforesaid. And the said late king further willed, and did thereby for himself, his heirs and successors, grant and confirm to the aforesaid mayor, bailiffs, and burgesses of the borough aforesaid, and their successors, that the mayor, aldermen, and bailiffs of the borough aforesaid, and the successors for the time being, or the major part of them, (of whom the mayor for the time being, the said late king willed to be one,) might and should have full power and authority to frame, constitute, ordain, and make, from time to time, such reasonable laws, statutes, and ordinances whatsoever, as to them should seem to be good, wholesome, useful, and honest and necessary, according to their sound discretion, for the good rule and government of the burgesses, artificers, and inhabitants of the borough aforesaid for the time being; and for declaring in what manner and order the aforesaid mayor, aldermen, bailiffs, and burgesses, and the artificers, residents, and inhabitants of the borough aforesaid, should behave, conduct, and carry themselves, in their offices, mysteries, and business within the same borough and the limits thereof, for the time being, and otherwise for the further good and public advantage and rule of the same borough, and the victualling of the same borough; and also for the better preservation, government, disposition, letting, demising of lands, tenements, possessions, revenues, and hereditaments to the aforesaid mayor, bailiffs, and burgesses, and their successors, by the said letters patent, or otherwise given, granted, assigned, or confirmed, or thereafter to be given, granted, or assigned; and other matters and causes whatsoever touching or in anywise concerning the aforesaid borough, or the state, right, and interest of the same borough." And the charter afterwards directs how the future mayors, bailiffs, and

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and aldermen, who are to succeed the first named of these officers, are to be elected.

These powers, thus given to the common council, are certainly very extensive; but, upon the best consideration I can give the case, they do not appear to me to take away from the body at large the power to make the regulation in question. Some of the things over which the common council held jurisdiction relate to the detail of the government of the borough; and even if the general words should be construed to go beyond that meaning, it appears to me, upon the whole, that they only apply to the government of the borough in its state as a formed borough, when the various members of the corporation are in a state of actual existence, and that it does not apply to the case of introducing new persons who are hereafter to become members of the borough. With these the common council have nothing to do; the election of them is confided to a different body, and it cannot be supposed that the king, by his charter, ever meant that the common council should have any thing to do in any respect with the mode of electing burgesses, or any regulations respecting them, unless such power had been expressly given by the words of the charter. Indeed, in *The King* v. *Head* (*a*), which is relied on to shew that the body at large have not this power, Lord *Mansfield* says, "The common council could not, by a bye-law, take away from the body at large the right of election which the charter had vested in the whole body."

In *The King* v. *Spencer* (*b*) Lord *Mansfield* says, "From the cases cited or alluded to, it appears to me that where the power of making bye-laws is by the charter given to a select body, they do not represent the whole community, and therefore cannot assume to themselves

(*a*) 4 *Burr.* 2521. (*b*) 3 *Burr.* 1837.

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selves what belongs to the body at large; but where the power of making bye-laws is in the body at large, they may delegate their rights to a select body, who become the representatives of the whole community." And Mr. Justice *Yates* says, "This bye-law was not actually made by the whole body."

And though there the principal reason for holding the bye-law to be bad was, that it was considered as excluding an integral part of the corporation, yet it seems to have been considered by the Court that the common council had no jurisdiction in such cases.

Then, if the select body have no power to make a bye-law relating to elections such as the present, such a regulation cannot be made at all unless by the body at large; and this consequence would follow, that in a corporation where a select body have power to make bye-laws for peculiar purposes, no such regulation can be made at all, and all the inconvenience of popular tumult and confusion must exist; and one of the powers which, from the time of the case in Lord *Coke* to the present time, has always been regarded as belonging to a corporation, must be lost, and cannot be exercised. And, independently of that inconvenience, if my former opinion be right, that a power to make bye-laws in particular cases given to a select body, does not take away the power of the body at large in cases to which the powers of the select body do not extend; and if the select body have no power to make a bye-law like the present to regulate the number of electors, then it follows, as a matter of strict and direct reasoning, that the power must remain in the body at large.

But there is another ground upon which I think the body at large have the power.

It is not necessary to consider whether by the common law a corporation has a right by election to connue its members, though by the case of *The King* v. *Bird*

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Bird (*a*) it should seem that they have. But by this charter there is an express power given to the corporation at large, to elect new burgesses out of persons either inhabiting or not inhabiting within the borough; and it is a general principle in all grants that the grant of a thing passes things included, without which the thing granted cannot be used.

This rule is so well established, and the instances of it so numerous, that it is quite unnecessary to cite any authorities upon it. And I consider that this express power to elect carries, as incident, every thing which is essential and necessary to carry that object into effect; and it is the same as if the charter had expressly given all those powers in terms; and if it had done so, the power which is afterwards given to the common council to make bye-laws, must be considered as abridged *pro tanto* by the powers given to the body at large.

But then, it may be said, you cannot consider any thing as incident to the power of election except what is essential and necessary to carry it into effect, and that a bye-law abridging the number of electors is not essential and necessary; but I think it is not to be so limited, and I think that a grant of a power to elect burgesses virtually includes a power to make all such reasonable regulations as the common law allows for the convenient exercise of the right.

The corporation have incidentally a power to make new burgesses, and the power to make new burgesses includes as incident the power to abridge the number of electors; and, therefore, without any special grant at all, the corporation would have a power to make the regulation in question. And, therefore, if there be an express grant, I think that the incidents to that grant

(*a*) 13 *East*, 367.

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are not confined to cases of necessity, but that it includes all that the common law gave with it.

One argument used against any powers of making bye-laws remaining in the body at large is, that as by this charter so very extensive a power is given to the common council, it cannot be presumed that the crown meant that the body at large should retain any power.

I cannot feel the force of that argument, because, if it be once conceded that the power of the common council does not extend to the whole objects of bye-laws, it is quite immaterial to how many it extends. Suppose, for instance, there are 100 objects of bye-laws, and the common council have a power over ninety-nine, is it to be inferred from such a proportion that the body at large is to be excluded? Suppose the common council had only power over ninety-eight or ninety, or fifty, or a less number, where is the line to be drawn?

I now come to the second part of your Lordships' question, which is as to the object and provisions of the bye-law.

And here a general objection is made to abridging the number of electors, that the power to elect is not given to the mayor, bailiffs, and burgesses generally in their corporate name, but to the mayor, bailiffs, and burgesses, or the greater part of them; and that, therefore, it is nescessary that the greater part of the burgesses should assemble at a corporate meeting for the election of new burgesses. But I think that is not so. It has been held, that in the case of an indefinite body, it is not necessary that there should be a majority present, and I think that this clause in the charter gives the power to the corporate body in general terms.

But then the question is, Whether aldermen may be substituted for the burgesses at large?

It appears to have been the practice in ancient times, that

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that in order to avoid confusion in popular elections, the number of electors should be limited, and that though the charter gave the right of election to the burgesses at large, a less number than the whole actually made the election; and some questions have arisen on this: "It was referred by the Lords of the Council to the Judges to know the law on this case, and it was resolved by the Justices, upon great deliberation and conference had amongst themselves, that such ancient and usual elections were good, and well warranted by their charters, and by the law also; for in every of their charters they have power given them to make laws, ordinances, and constitutions for the better government and order of their cities or boroughs, &c., by force of which, and for avoiding of popular confusion, they, by their common assent, constitute and ordain that the mayor or bailiffs, or other principal officers, shall be elected by a selected number of the principal of the commonalty, or of the burgesses, as is aforesaid, and prescribe also how such selected number shall be chosen; and such ordinance and constitution shall be good, and allowable and agreeable with the law and their charters for avoiding of popular disorders and confusion; and although now such constitution or ordinance cannot be shewn, yet it shall be presumed and intended in respect of such special manner of such ancient and continual election (which special election could not begin without common consent), that at first such ordinance or constitution was made: such reverend respect the law attributes to ancient and continual allowance and usage, although it began within time of memory." The Case of *Corporations.* (*a*)

The same case is very shortly mentioned in *Jenk.* 273. case 93.

In *The Corporation of Colchester* v. ———, *&c.* (*b*)

(*a*) 4 *Rep.* 77 *b.* (*b*) 3 *Bulst.* 71.

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it is laid down by *Coke* C. J. and the rest of the Court: — "That if there be a popular election of the mayor and aldermen in corporation towns, and this happens to breed a confusion amongst them, this may be altered by their agreement, and by the common consent of all, to have their elections made by a fewer number, but not otherwise. But if by their charter they are to be elected by them all, then this is not to be altered but by and with the general assent of the whole town, and so by this means to take away confusion." The same doctrine is fully recognized in several subsequent cases in more modern times, viz. in *Rex* v. *Tomlyn* (*a*), *Rex* v. *Spencer* (*b*), *Phillips* v. *Mayor of Carmarthen* (*c*), and *Lee* v. *Wallis* (*d*), to the particular circumstances of which it is not now necessary to refer.

But cases have occurred where questions have arisen as to the application of the rule; and in *Rex* v. *Spencer*, who claimed to be a common councilman of *Maidstone*, the power of electing the common council was in the mayor, jurats, and commonalty, and the charter gave a power to make bye-laws to the mayor, jurats, and common council. The mayor, jurats, and common council made a bye-law to restrict the numbers of electors to the mayor, jurats, and common council, and such of the common freemen as had served the office of churchwarden and overseer of the poor. It was held, that the bye-law narrowing the number of electors could not be supported, because the bye-law restricting the number of electors was not made by the body who had the right of election; and, also, because it excluded such of the commonalty as had not served an office which had no connection with the corporate character, and confined

(*a*) *Cas. temp. Hardw.* 316.
(*b*) 3 *Burr.* 1827.
(*c*) 3 *Burr.* 1833.
(*d*) 3 *Burr. ib.*

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the right of voting to such as had served the office of churchwarden and overseer of the poor.

In *Rex* v. *Cutbush* common councilman of *Maidstone* (*a*), the bye-law was made by the mayor, jurats, and common council, and to confer the right of election on the mayor, jurats, common council, and sixty senior freemen.

There the bye-law was made by a select body, and was held bad, because the right of election is in the mayor, jurats, and commonalty. In *Rex* v. *Head* (*b*), four burgesses were created, who, with the mayor, should be the common council, and should have power to make bye-laws. The right of election was in the mayor and commonalty, together with the aldermen. The common council made, with the assent of the commonalty, a bye-law that the mayor and aldermen, exclusive of the commonalty, should elect the burgesses. It was held bad. There there was an integral part of the electors excluded, viz. the commonalty; for the power of election was in the mayor, aldermen, and commonalty, and therefore they could not exclude the commonalty, who were by this means not represented.

It may be observed, also, that the bye-law was irregular; first, because not made by the mayor and aldermen only, who had the power to make bye-laws: they called in the commonalty to assist. Therefore, under the charter, it was bad. Secondly, it was bad under the general powers in the corporation, because the aldermen as a body were not the corporation; the mayor and commonalty were the corporation; and the commonalty were called in only to assist, and did not form an integral part of the meeting. Thirdly,

(*a*) 4 *Burr.* 2205. (*b*) 4 *Burr.* 2525.

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it was bad, because if made by the mayor and aldermen only, they as a separate body had no right to make bye-laws as to elections where the right was vested in the mayor and commonalty, together with the aldermen.

In *Rex* v. *Ashwell* (*a*) the right of electing the aldermen was by charter given to the mayor and burgesses, and they made a bye-law restricting the electors to the mayor and certain of the burgesses, viz. the recorder, aldermen, coroners, common councilmen, and such of the burgesses as had served the office of chamberlain or sheriff; and such bye-law was held good.

In *Rex* v. *Bird* (*b*) the right of election of burgesses was by the charter in the mayor and burgesses. The mayor and burgesses made a bye-law to restrain the number of electors to the mayor, aldermen, and eighteen burgesses there mentioned, and the defendant was elected by the persons under the bye-law.

No doubt was entertained as to the general right of the corporate body to make a regulation to limit the number of electors, and the defendant was held well elected. And in all those cases the general power of the corporate body is admitted.

Then, there may be questions, Whether, admitting the general right of the corporate body, this restriction falls within the principles of law? And one objection may be, that the aldermen do not fairly represent the burgesses; because, there is no doubt but that in the body created by the bye-law or regulation the burgesses must be represented.

I am very free to admit, that there is as little representation of the burgesses as one can well imagine, and much less than has occurred in any of the cases,

(*a*) 12 *East*, 22. (*b*) 13 *East*, 367.

But

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But still they do, in a small degree, represent the burgesses.

The aldermen, by being elected, do not cease to be burgesses; they are still burgesses, though with more authority. They are not an integral part of the corporation.

If there be a meeting of the body corporate, which consists of the mayor, bailiffs, and burgesses, it is not necessary that any of the aldermen should be present; and if they are present, they do not vote as aldermen, but as burgesses. And they are only a different body from the burgesses at large, when, in their quality of aldermen, they are to discharge the various duties assigned to them.

It must be observed also, that this mode of election is that which was adopted by custom before the charter in question, and, therefore, one may well presume, that it was a reasonable mode of election, and not attended with any prejudice or inconvenience to the general interest of the corporation; and though that cannot be taken into consideration in considering the effect of the third plea,—because the facts stated in one plea cannot be brought to bear upon the facts in another plea so as to affect the construction of that plea,—yet, one may at all events put a supposition that such a mode of election might exist before the charter.

It may be said, that the rule laid down in the Case of *Corporations* does not extend to burgesses, but only to the higher corporate officers: and the language of the resolution is only applied to them. But the same reason applies to burgesses that does to the higher officers of the corporation; and there is even a still stronger reason for avoiding popular tumult and confusion, because the election of burgesses is of more frequent occurrence than that of the higher officers.

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The case of *The King* v. *Head* was that of the election of a burgess, and no distinction was made between a burgess and any superior officer of the corporation. In like manner, *The King* v. *Bird* was the case of a burgess, and no distinction was made.

It has been held, indeed, as appears by 4 *Inst.* 48., that if the corporate body at large have a right to elect members of parliament, they cannot delegate that power to a select body; but that is, because it is considered as for the benefit of the public that they should all have votes, and it is not to be compared to the case of the election of mayors and other corporate officers.

If the bye-law be found inconvenient, the corporate body may repeal it by the same authority by which they made it; and, therefore, if any mischief be likely to arise, they may correct it themselves.

I am therefore of opinion, that this is a legal and valid bye-law.

GARROW B. My Lords, in a case where I can only explain my reason for considering this a good bye-law by going over details in a less lucid order than has been used in the arguments addressed to your Lordships by my two very learned brethren who have preceded me, I shall simply state the conclusion to which I have arrived, without troubling your Lordships with the cases they have cited, or offering any observations upon them. After having exercised the best judgment that belongs to us, in order to prepare ourselves in a clear and proper manner to answer the questions your Lordships have been pleased to propose, I am one of those who concur in the opinion which has been pronounced by the two learned Judges who have just addressed your Lordships. I shall only state to your Lordships that I did entertain some doubt on the question, Whether the corporation had

had the power of delegating this right to the select body? But I have at length arrived at a step, where I have satisfied my own mind that they have that power. And after the conflicting opinions of the Court below, however difficult it might appear to decide, whether this was or was not a legal bye-law, if your Lordships put the question to me, Whether it is, or is not, I am prepared to say, that it is not only a legal, but a convenient and meritorious and useful bye-law.

PARK J. The question propounded by your Lordships to His Majesty's judges is extremely concise, and brings the matter to a single point; and, notwithstanding the extreme length of argument in the Court below, and the elaborate argument of my learned brothers who have preceded me, I shall be extremely short, agreeing, entirely as I do, with my brothers *Littledale* and *Gaselee* in the opinion they have lately pronounced.

The question is, whether the alleged bye-law, stated in the third plea, is a legal and valid bye-law, having regard, as well to the power of making bye-laws in the corporation in that plea mentioned, as to the object and provisions of the said bye-law itself.

The third plea has been so often under your Lordships' cognizance, I should think it an idle waste of your time to read it again.

I take it to be quite clear, ever since the case of *Sutton*'s hospital, that the power of making bye-laws is incident to every corporation where such incidental power is not restrained by the words of the charter. But here the generality of that inherent power is restrained, by giving power to a select body to make bye-laws in certain cases: and I admit that if the power be given to a select body to make bye-laws in all cases, the general inherent power is then, in all cases, entirely taken away from the body *at large*. But, on the other

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hand, it seems to me no less clear that, if a *special* power be only given in certain cases, the general authority, in all other cases, remains in the body at large.

Let us see then what power of making bye-laws is here given to a select body. It is that the mayor, aldermen, and bailiffs (who are the select body), and their successors for the time being, or the major part of them (of whom the mayor should be one), "might and should have full power and authority to frame, constitute, ordain, and make, from time to time, such reasonable laws, statutes, and ordinances whatsoever, as to them should seem to be good, wholesome, useful, honest, and necessary, according to their sound discretions, for the good rule and government of the burgesses, artificers, and inhabitants, of the borough aforesaid, for the time being; and for declaring in what manner and order the aforesaid mayor, aldermen, bailiffs, and burgesses, and the artificers, inhabitants, and residents of the borough aforesaid, should behave, conduct, and carry themselves, in their offices, mysteries, and business, within the same borough and the limits thereof, for the time being; and otherwise for the further good and public advantage and rule of the same borough, and the victualling of the same borough; and also for the better preservation, government, disposition, letting, demising, of lands, tenements, possessions, revenues, and hereditaments, to the aforesaid mayor, bailiffs, and burgesses, and their successors, by the said letters patent or otherwise given, granted, assigned, or confirmed, or thereafter to be given, granted, or assigned; and *other matters and causes whatsoever, touching, or in anywise concerning, the aforesaid borough, or the state, right, and interest of the said borough.*"

These words are certainly very large; and this is the power given by the charter to the select body to make bye-laws; and if the bye-law in question falls within any of

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of the powers hereby conferred, there is an end of the question.

But it was admitted in the argument in the Court below, and till to-day I did not hear it denied, that the select body, to whom the power I have just recited is granted, would not under it have authority to make the bye-law in question; because it would not enable them (the select body) to make a law giving to themselves that power of election which is given to the corporation at large.

Then if it be true that every corporation at large has an incidental power to make bye-laws, except as it is restrained by express words in their charter, and if it be admitted that this bye-law does not fall within the words of the special authority, it seems to me a necessary consequence that all that which the king has not expressly taken away, remains in the body at large.

But it is said this doctrine militates with that laid down in the case of *Rex* v. *Head* (*a*). But with all due respect to those who urge that point, it seems to me no two cases can be more dissimilar. In that case the body at large had no power to make bye-laws, but it was vested in the mayor and aldermen only; or if it were not so, the argument in that case proceeded upon that assumption; whereas the bye-law there, was made by the mayor and aldermen, *with the assent of the commonalty*, who ought not to have been, because not authorised to be, parties to such a law. Besides, the right of election of burgesses was there given expressly to the mayor, aldermen, and *commonalty* of the borough. Whereas the bye-law struck out one integral part of the corporation wholly, viz., the commonalty; and to such a course the assent of the commonalty could be of no avail, because they had no right to

(*a*) 4 *Burr.* 2515.

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concur in making a bye-law. I therefore think the case now before your Lordships cannot be governed by that of *The King* v. *Head*; and, for the reasons I have shortly stated, I think the corporation at large had power to make *this* species of bye-law, not being a *matter* or *cause* intended by the king to be included in the power given to the select body.

But it is said, even if the corporation had the power of making bye-laws, (and upon that our opinions are also required as to the object and provisions of the bye-law,) that this bye-law is void, because it transfers the election of burgesses to the *mayor and common council*, without the concurrence or assistance of the rest of the burgesses of the said borough; and is, therefore, unreasonable, and varies the constitution of the borough, striking off an integral part of the corporation.

Upon this point there is, I believe, less difference of opinion amongst my brethren than upon the former question. What then is the bye-law? That the *mayor*, *bailiffs*, and *burgesses*, that is, the body at large by their corporate name, or the major part of them, being duly assembled for that purpose within the borough, should and might from time to time, and at all times thereafter, by *themselves, and without the concurrence or assistance of the rest of the burgesses of the borough*, elect and choose such person or persons to be a burgess or burgesses of the said borough, as to them the said mayor and *common council* of the said borough should seem meet.

Now I can discover nothing illegal or unreasonable in this. If it be inconvenient, the same authority which made the rule may in due form abrogate it.

It appears to have been the ancient and frequent practice, that, in order to avoid confusion and disorder in popular elections, and for the better rule and government of boroughs, the number of electors should be limited, and that though the charter conferred the right of

of election on the mayor, bailiffs, and burgesses generally, a less number than the whole actually made the election. Your Lordships know that in stating this I am stating nothing new: for this was declared to be the law ever since my Lord *Coke*'s time (*a*), and as having been the ancient law of corporations, for this question upon similar charters was referred by the Lords of the Council to all the justices, and it was resolved by them, upon great deliberation and conference had amongst themselves, that such ancient and usual elections were good and well warranted by their charters, and by the law also, for in every of their charters they have power given them to make laws, ordinances, and constitutions for the better *order and government* of their *cities* and boroughs, &c. *by force of which, and for avoiding popular confusion*, they, by their common assent, constitute and ordain that the mayor or bailiffs, or other principal officers shall be elected by a selected number of the principal of the commonalty, or the burgesses as aforesaid, and prescribe also how such selected number shall be chosen: and such ordinance and constitution was held to be good and allowable, and agreeable with the law and their charters for avoiding of popular disorder and confusion. This then was the declared law, and it has been acted upon ever since: and I am sure that it is most desirable that every thing in boroughs that can tend to prevent popular tumults (which would be constantly the case if the election of burgesses were to be in the *whole* body of burgesses), ought to be enforced.

In the case of *The King* v. *Ashwell* (*b*), the charter had given the power of electing an alderman to the mayor and burgesses of *Nottingham*, seven aldermen to be chosen from themselves. By a bye-law in *May*

(*a*) 4 *Rep.* 77 *b.* (*b*) 12 *East*, 22.

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1577, though not now extant in writing, for the avoiding popular confusion and tumult in the election of aldermen, it was ordained, that the mayor and *certain* of the *burgesses* of the town, viz. the recorder, &c. &c. without the *concurrence and assistance of the other burgesses* (in the very words of the present bye-law) should elect, &c. This case held such a bye-law to be good; and not cutting off an integral part, as has been argued in this case, but only limiting the *numbers* of that body. Lord *Ellenborough* says, it is not unreasonable, nor is it *inconvenient*, but the contrary; and if it be found inconvenient, his Lordship said, as I have presumed to say to your Lordships, it is competent to the corporation, by the same authority which enacted to have repealed it. Mr. Justice *Bayley*, on the subject of inconvenience, said, that such a law binds none who succeed in the corporation, unless they choose to be bound by it. It is liable to be reconsidered by them at all times: it only binds their successors so long as the successors choose to be bound by it; for the same body that made the bye-law may repeal it.

The bye-law, in this case, has now existed upwards of 150 years; and, during that long period, it has never been found so inconvenient as to induce the corporation of this borough to alter it.

In the next case of *The King* v. *Bird* (*a*), when the Court of *King's Bench* was composed of the same four very learned judges as when the *King* v. *Ashwell* was determined, viz., Lord *Ellenborough*, Mr. Justice *Grose*, Mr. Justice *Le Blanc*, and Mr. Justice *Bayley*, and when one of the questions was, whether it is competent for a corporation at large, when the power of making voluntary elections is incidental to the corporation, or is in them by prescription, to delegate it to a select part of

(*a*) 13 *East*, 367.

themselves,

themselves, and, consequently, whether a bye-law so made was good in itself. As to the latter point, upon which I am now troubling your Lordships, Lord *Ellenborough* said: — "It appears to me, not only to be a good, but a *very* good bye-law. It is calculated to exclude popular confusion in elections; a principle long ago established in the Case of *Corporations*, and I see no reason why it should not have been as much applicable to the election of burgesses at large, as of the higher officers of the corporation in the time of Lord *Coke*."

I quite agree with the opinion here delivered by that noble and learned Judge, and as a limited number of burgesses still vote in the election of a burgess, an *integral* part of the corporation at large, who have the power of making bye-laws, is not cut off, but only limited, I see no ground for the objection. And therefore, in reply to the question propounded by your Lordships to the Judges, but feeling sorry that I am differing in opinion with many of my learned brothers, whose opinions I most unfeignedly respect, I answer, that I am of opinion that the bye-law stated in the third plea upon this record, having regard, as well to the power of making it by the corporation at large as to the object and provisions of the bye-law itself, is a good and valid bye-law.

BAYLEY J. My Lords, with very great respect for those of my learned brethren who differ from me, and greatly regretting that I differ from them, I am constrained to say that I am of opinion that this bye-law is not a legal and valid bye-law, regard being had, as well to the power of making bye-laws given to this corporation by the charter mentioned in the third plea, as to the object and provision of the bye-law itself. My Lords, the objections which occurred to my mind against the validity of this bye-law, were mentioned by me

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me when the case came before His Majesty's Court of King's Bench; and it would be a waste of your Lordships' time to repeat them. I beg, therefore, only to call your Lordships' attention to those further reasons, which have struck my mind after having had the opportunity of hearing the arguments at the bar of your Lordships' house.

My Lords, I should propose to your Lordships' consideration two propositions: the first is, that where the crown, either in an existing prescriptive corporation, or in one newly created, gives a power of making bye-laws to a select part of that corporation, it has put an end to, in a pre-existing corporation, or has prevented, in a newly created corporation, any right of making bye-laws in the corporation at large; unless it can fairly be inferred, from the limited extent to which the power of the select body is confined, or from the nature and importance and well-being of the corporation, that it should have a power to which the power of the select body does not extend; or that it might have been the intention of the crown, in addition to the power given to the select body, to give a more extensive power to the body at large; as also, that it was the object of the crown that there should be such co-extensive power in the *instance* in which the body at large have taken upon them to make a bye-law. I mention, as my second proposition, that, in this instance, the objection occurs that the crown never could have intended to allow the body at large the power of making such a bye-law as that which has been made in the present case; the bye-law, in my apprehension, being a fraud on the constitution of the borough.

By the charter, the right of making bye-laws in this corporation is given exclusively to the select body; and whether the common council had or had not, from time immemorial, up to the time of the charter, the same

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same power, the third plea does not seem to state. It contains no allegation upon this, whatever, and though I concede that the power of making bye-laws is *primâ facie* in the corporation at large; yet to warrant the founding an argument, that before the charter the sole right of making bye-laws was in the corporation at large, I am disposed to think that it ought to have stated expressly (and not to have left it uncertain) that the corporation had the sole right up to the time of granting the charter, more especially when the power of the select body is stated in the plea.

I cannot, however, find any express authority on this point, and I shall content myself with noticing but one or two as I pass along, it being my opinion, that if the corporation at large had the right prior to the time of the charter, the effect of the charter was to alter it. The power given by the charter is undoubtedly a power of making bye-laws for the government of the borough, and no bye-law has been suggested by any of the learned Judges who have preceded me, except that which is the subject of this case, which will not be within the compass of the express power given to the select body. The power is given to enable the select body to make such bye-laws as to them may seem good, wholesome, useful, honest, and necessary, &c. &c. &c. Now what further power could be required? Not any that I am aware of. If so, can it be supposed that the crown could have intended that there should have been a co-existing power in the body at large? Could it have been intended to give the power to make such a bye-law as this, constituted as this borough is? Looking at the constitution of the borough, and the nature of this bye-law, I am led to a contrary conclusion. The borough consists, as I am bound to take it from the plea, of a mayor, bailiffs, and burgesses; and as there is nothing to shew that the freedom was to be obtained by servitude

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vitude or birth, it must be by election, and by election only, that a man can become a burgess. In every case, therefore, the number of burgesses must depend entirely on the will of the electors. Whether there shall be five, or fifty, or 500, depends entirely on them. The number of the common burgesses may be below that of the select body. It might have been so at the time this bye-law was passed, it may have been so ever since. Under such a bye-law, the mayor, bailiffs, and common council all vote, and is not every one of them interested in the vote he gives? And upon the question, Whether the body at large have the right of election, has not every one of the select body an interest in saying it shall be in the fifteen, and in the fifteen only? Generally speaking, when you are voting for that which is to be for the benefit of the corporation at large, you ought to have votes given by those persons who have not an interest in the question; though in this question, when they are deciding, they have a private interest of their own in opposition to the interests of those whose rights they take away. It is a specious argument to say that the body at large may, when they think fit, repeal the bye-law and revest the right where the charter has placed it; but it is so clearly touching the interests of the common council that there should not be any repeal, that it is not improbable they may take care that the number of burgesses shall never be able to carry the repeal into effect.

Considering that the power of making bye-laws is expressly given to the select body, I am of opinion that the right of making bye-laws in this borough exists only where the charter has confined the power in question, namely, in the select body. Every corporation has a power to make bye-laws, either in the body at large or in a select part of that body; but I am not aware of any instance in which the double power has been exercised. There

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is no instance mentioned by any of the learned Judges who have preceded me, nor am I aware of any instance being mentioned, or that can be found; if I had known of any, I should certainly have thought it my bounden duty to have mentioned it to your Lordships, but I am not aware of any. In the case of *Norris* v. *Staps* and the *City of London* v. *Vanacker*, the Court held, that the power of making bye-laws was incident to every corporation, either by the body at large or by a select body; but to my mind, it appears clear that it must be either in one or the other, and cannot be in both. In *Child* v. *The Hudson's Bay Company* (*a*), Lord *Macclesfield* says, "A corporation has an implied power to make bye-laws, but where the charter gives the company a power to make bye-laws, they can only make them in such cases as they are enabled to do by the charter; for such power given by the charter implies a negative; that they shall not make bye-laws in any other cases." So, my Lords, it is a fair and reasonable inference, that where a charter gives to a select body a power to make bye-laws in terms applicable to almost all the purposes to which a bye-law can, for the regulation of a body, be required, it implies a negative that there is not a co-existing power in any other body.

Upon my second proposition, the case of *The King* v. *Head* seems to me to be a very powerful authority in favour of my view of the question submitted to us, and I am not quite satisfied whether, hitherto, it has had that full attention to which it is entitled; and I venture humbly to submit, that it would be as well to refer to that case before coming to a final decision.

That was the case of the corporation of *Helstone*, where the burgesses were incorporated by the name of the mayor and commonalty; and by the charter four

(*a*) 2 *P. Wms.* 507.

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of the more discreet members were created aldermen, and they, with the mayor, were to be the common council, and to make bye-laws; the right of election was in the mayor and commonalty, together with the aldermen, and they made a bye-law, with the *assent of the commonalty*, whereby it was enacted, that the mayor and aldermen, exclusive of the commonalty, should elect the burgesses. The question was on the validity of that bye-law. Two objections were made: one, that it excluded an integral portion of the corporation, namely, the commonalty; but upon this point, as far as I can collect it from the report, the judgment of the Court does not appear to me to have proceeded. The other objection was, that the assent of the commonalty could give no title. I should wish your Lordships to see the manner in which that point was argued, before you determine on this case, for the purpose of ascertaining what it was to which the opinion of Lord *Mansfield* was directed. Mr. *Thurlow*'s argument was, that the assent of the commonalty would be of no effect; "that it was null and void, and cannot bind their successors. The power of making bye-laws is given by the charter to the mayor and aldermen *only*; the commonalty have no authority to interfere at all in that matter. It is not within their province; they could not be summoned for such a purpose; nor if they were summoned, could they do any single act that would be valid, in relation either to the making bye-laws, or assenting to or dissenting from them. All their acts of that kind would be nugatory, null, and void, as they have no sort of power to meddle therein."

Then he draws this as a consequence; "consequently, this bye-law is to be considered as made by the mayor and aldermen alone; and the addition of the words, 'with the assent of the commonalty,' makes no difference, nor carries any real meaning, because they

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they had no concern in what was transacted any more than any other person, or even an absolute stranger to the corporation."

Now, my Lords, what says Lord *Mansfield* on this mode of argument? Does he except to any part of it? When it is asserted, that the commonalty had no power to interfere in the matter; that they could not be summoned for any such purpose, either to make a bye-law or to dissent from it; does he interfere either to qualify it or the reverse? No; he stops Mr. *Thurlow*, who was pursuing that argument, and says, "the body at large have no power of making bye-laws, because that power was by the charter given to the common council." It is a power given to the common council to make the bye-laws, and the commonalty had no right to interfere; they had nothing to do with making bye-laws; and the common council, he says, could not, *by a bye-law, take away from the body at large that right which the charter had vested in the whole body.* This, as it seems to me, is the single ground given for the decision; and it was on this, and this alone, that it professes to be founded. Now, my Lords, if it be so, is it not an authority on the very point which your Lordships are considering? It is said, there is another objection to that bye-law; it purports to be made by the mayor and aldermen, *with the assent of the commonalty:* but the commonalty had not otherwise interfered; and I cannot believe that that is the foundation of Lord *Mansfield*'s decision.

I would further ask, whether Lord *Mansfield* could have entertained a notion that there was a double power given to the corporation, which was a corporation by prescription, and afterwards incorporated by the name of the mayor and commonalty? There is not a hint from him that, in order to have made it a valid bye-law, it should have been made by the mayor, common council,

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council, and burgesses. On the contrary, he says, in very distinct terms, that the commonalty had no power.

My Lords, for that reason, I think this bye-law is not valid. If, in that case, it had been thought that a bye-law of this description could have been made by the corporation at large, is it not probable that they would have put it in that way in the pleadings? It appears to me that that case is a very powerful authority on the present question; and, on the whole, there being no instance in which there has been a double power exercised, and it appearing that there is nothing pointed at in this case, to which the general power of the body at large would have been applicable, except a bye-law of this nature, and as the charter in this case, in distinct terms, gives a right of election to the mayor, aldermen, and burgesses, I humbly submit to your Lordships, that the corporation has not the power of making such a bye-law; and that it is, therefore, illegal and void.

ALEXANDER C. B. My Lords, I think the question ought to be answered in the affirmative; and as I concur in many of the reasons which have been already given for this opinion, it will be less incumbent upon me to explain them fully.

The bye-law was made, as stated in the plea, by the mayor, bailiffs, and burgesses, of the borough, that is, by the persons to whom the charter is addressed, — by the body at large.

It appears to me to be a settled principle, pervading the whole law upon the subject of corporations, that a power to make bye-laws is incident to every incorporation.

It is so expressly laid down in the *Launceston* case(*a*), one of the earliest authorities referred to upon this subject;

(*a*) 1 *Roll. Abr.* 513.

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is always acknowledged whenever there is occasion to allude to the point, and has not, that I know of, been ever doubted, much less contradicted.

This bye-law, therefore, being the act of the whole incorporation, must be valid, unless some of the objections that have been made to it shall appear to be founded.

I concur in none of them; and in consequence agree with the two Judges of the King's Bench who decided for the defendant on the third plea.

This is the general view which I take of the question.

Three objections only have been made to this bye-law.

One of them is founded on a supposed want of power in the body who enacted this law, to make any law; and the two others are founded on a supposed illegality in the object and provisions of the bye-law itself.

No other question of any importance has been suggested.

The objection to the power of the enacting body depends, as it seems to me, entirely upon the effect of the charter of Charles the Second, and the acceptance by the old corporation of that charter.

It is said that this charter confers upon a select body, namely, the mayor, aldermen, and bailiffs, being the common council, full power and authority to constitute and ordain all reasonable laws, statutes, and ordinances, according to their discretion; and then, without denying that there was incident to the incorporation a power to make bye-laws, the argument insists that this incidental power ceased in the body at large by the acceptance of the charter conferring upon the select body the same authority.

A satisfactory answer has been given to this argument. Though the clause conferred power of making laws upon the select body, it still remains to be determined to

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what subjects that power, according to the true construction of the charter, extended.

That point must be determined; because, if the authority to make laws, bestowed upon a select body, be limited, either by the express terms of the grant itself, or be limited by the construction which the general terms used ought to receive, it follows, as it appears to me, that the implied revocation of the powers previously existing in the incorporation at large, must have the same limitation. The previously existing powers are revoked or extinguished, so far only as they are or can be conferred on the select body. Such is the nature, I think, of all implied revocation.

Without entering upon any analysis of the language employed in the charter for bestowing on the select body the power to make bye-laws, I will remind your Lordships that there is not in it any one specific expression pointing at this subject, and if it be sought for there at all, nothing but general expressions can be pointed out as conferring it.

I will not enquire what ought to be the consequence of a power given in unequivocal and express terms to a select body to legislate upon such a subject as this. What is of more importance, I will request of your Lordships to recollect, that it is expressly decided, that the ordinary case of an authority given in general words, as here, will not by law warrant an ordinance made by the select body to limit the powers of the general body in a material point.

This is the rule laid down in the *Maidstone* causes,— *The King* v. *Spencer* and *The King* v. *Cutbush*, — this is the point decided by them, and perhaps they ought not to be considered as deciding any thing else; but they are always treated as fixing that point. Therefore, in the present case, the select body had not by

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by the charter, nor by law, the authority to make the ordinance now in question. The consequence is, that, according to the principles I have mentioned, the authority to make such a bye-law continued in the corporation at large, if ever it resided there.

In answer to the assertion, that the power in the select body conferred by the charter would deprive the general body of that power which the general law respecting corporations confers upon them, it is my humble opinion, that no power of making any such bye-law was conferred by the charter on the select body, and therefore, that it could not deprive the incorporation at large of the power which they before had of making such a law as that now in question.

My Lords, it would not be difficult for me to unfold this argument more at large; but I will not occupy the important time of your Lordships in doing so. I avow that I have adopted my view of this part of the subject from the reason of one of the learned Judges who decided this cause below, — a Judge equally distinguished for the depth of his knowledge and the solidity of his understanding, whose infirmities have withdrawn him from the public service. My Lords, I am not citing this opinion as authority; I do not forget that this opinion is at the present moment under review. I am not using the *exceptio ejusdem rei cujus petitur dissolutio*; I mention it only, lest it should seem to any of your Lordships that I have passed too rapidly over an important part of this question. I have done so to economise the time of the House, feeling as I do, that the observations which have affected my mind are to be found in the opinion to which I have alluded.

The argument rests on the hypothesis, that the crown *intended* to give the power to the select body.

Strange hypothesis, that the crown *intended* by certain words to confer a power which it is decided those words,

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though used by the crown, will not give, and upon that hypothesis to take away a power which, it is admitted, would otherwise reside in the body at large. I conclude, then, on this point, that as the authority to legislate on this subject must reside in the incorporation at large or nowhere, the incorporation had that authority, which is now denied to them, and that the want of authority is not a good objection to the bye-law.

The next objections are to the objects and provisions of the bye-law. They are two.

The first I shall notice is, that the bye-law disfranchises an integral part of the corporation.

If this objection were true in fact, the legal consequence would not be disputed. It is an acknowledged principle, that any bye-law displacing from its functions an integral part of the corporation, is invalid.

The answer to this objection is, that it is not true in fact. No integral part of the corporation, which has any function to perform upon this subject, is displaced from that function.

The assertion on the part of the appellant is, that the whole body of the burgesses are so displaced.

The respondent answers, that is a misrepresentation of the fact.

The function or power to elect burgesses is conferred by the charter on the mayor, bailiffs, and burgesses. No notice whatever is taken in this particular provision of the aldermen as a distinct body, so as to sever them in the exercise of this particular duty from their brother burgesses. That they must be burgesses is manifest from the direction for choosing them. It is expressly provided, that upon the death or removal of an alderman, his place shall be supplied by an election to be made from among the burgesses.

When, therefore, the charter directs, that the mayor, bailiffs, and burgesses shall elect burgesses, it must necessarily

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cessarily include every alderman in his individual character of a burgess; and when the bye-law ordains that the mayor, bailiffs, and aldermen shall elect burgesses, they expressly give the power to a select number of the burgesses, and do not exclude that body. They limit them—they select them, but do not exclude that integral part of the corporation. It is precisely the same thing as if the bye-law had enacted that the burgesses shall in future be chosen by the mayor, bailiffs, and such of the burgesses as should be aldermen.

The limitation might be objected to; the new condition required of the burgesses, before they could concur in the election, might be complained of; but it is impossible to urge, with any plausibility, the technical objection, that by this ordinance an integral part of the corporation is excluded.

The third, or last objection, ssems to me the most important of all. It touches somewhat the political considerations which may be permitted to mix themselves in these questions.

It is said that the decisions which have supported bye-laws limiting the number of electors, are confined to the elections of *officers* of the corporation. To them somebody must be nominated, and the question is, Who? which is of inferior consequence; but that upon this question, it depends of how many the body itself shall consist, which is of superior importance, and affects the constitution itself. That, in the present case, the alteration is made in such a way as in all probability to limit much the number of the corporation, and by that means to prevent the bye-law being ever revoked without the consent of the select body, to whom the authority is delegated. This is urged as being a fatal objection to the principle of the bye-law. The distinction taken is between a law regulating the election of a superior

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officer, and one regulating the election of burgesses who individually constitute the body at large.

Several observations, made in answer to this view of the subject, have prevented my adopting it.

The first is, that it is entirely new. No such distinction that I have been able to discover was ever pointed at until *The King* v. *Bird*, before Lord *Ellenborough*, the last case before the present.

The language respecting the power in corporations to limit the number of electors is always general.

From the Case of *Corporations* downwards, in all the various questions that have arisen respecting limitations imposed by ordinances on the number of electors, no counsel, no judges, that I have been able to discover, ever alluded to such a distinction.

It is difficult not to doubt the soundness of a distinction, which appears to have escaped many considerable men, during ages; though their attention was called to subjects closely connected with it. It is quite true, as has been observed, that almost all the cases related to the election of officers; but it is equally true, that the principles upon which these cases were decided, whether the bye-law was approved or condemned, are applied generally to all elections; and that, neither by way of argument or illustration, is any difference made between the election of an officer or of a burgess.

I have said that almost all the cases related to the election of officers. This is not universally true. The cases of *The King* v. *Head* (*a*), and *Hoblyn* and *Others* v. *The King*, in this house, are cases in which the controversy related to the election of burgesses. They are, in effect, the same case; but they came in a different form, and were argued before different tribunals. Look through these arguments, you will find the same cases

(*a*) 4 *Burr.* 1515.

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cited, the same principles insisted upon, as in the usual debates upon the bye-laws regulating the election of officers; as far as we can guess from the reports that have been handed down to us, the cases were decided exactly upon the same grounds. In *The King* v. *Head*, Lord *Mansfield* says, — "This is exactly the case of *Maidstone*." It was a very short case. In substance it was this. The charter gave the power of electing burgesses to the mayor, aldermen, and commonalty. It gave the power of making bye-laws to the mayor and aldermen. The mayor and aldermen made a bye-law, displacing the commonalty from the exercise of their function of election. Upon the ground that it displaced an integral part of those to whom the charter confided this function, the bye-law was held to be invalid. It occurred to no man, counsel or judge, to state that the subject, the election of burgesses, was one which could not be touched by any bye-law. It seems impossible, if such a principle had been present in their minds, that it should not have come forth upon that occasion.

The latest case except the present, *The King* v. *Bird*, before the King's Bench in the time of Lord *Ellenborough*, is a positive decision in favour of my view of this point which I am now discussing. It is nearly, and, as it seems to me, in every material respect, the same case as that before your Lordships. The controversy regarded the election of a burgess, and not of an officer. Here, for the first time in argument, the distinction between the election of an officer and the election of corporators is brought forward by Mr. *Dampier*, one of the counsel. It no sooner appears than it is crushed. Lord *Ellenborough*, in page 385. of the Report, says, "It is calculated to exclude popular confusion in elections, a principle which was long ago established in the Case of *Corporations*, and I see no reason why it should not have been as much applicable to the election

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of burgesses at large, as of the higher orders of the corporation in the time of Lord *Coke*."

Such is the reception which this distinction receives when it first presents itself at this late period. I trust, therefore, your Lordships will not think that I have rashly represented this distinction between the election of officers and the election of corporators, as having no foundation in any ancient authority, and as contradicted by some that are modern.

These circumstances, I humbly submit, constitute a strong argument against it.

It will be proper to enquire, shortly, whether this distinction is better supported by the principle of the decisions, than it is by their language.

One prevailing reason for this licence to alter in some degree the construction of a corporation as to elections, pervades every authority upon the subject. It is announced in the Case of *Corporations*, and reappears whenever the subject is mentioned. The authority is given by the law for the avoiding of popular disorder and confusion. To alter the right or mode of election prescribed by the charter, is beyond all dispute a variation of the constitution in every case. But the law allows and supports it for the important reason given.

We should therefore, *primâ facie*, allow and support it wherever the reason exists. Does it not exist in the case of corporators, as much as of officers annual or otherwise, of those who are to nominate? Are the people of this country so ignorant and short-sighted, as not in many cases, to know and feel that upon the event of the election of corporators, other more prominent and seemingly important elections may depend? It would be wasting words to employ more in reminding your Lordships, that every mischief which it is the object of this rule of law to remedy or to prevent, is as likely

likely to occur in the election of corporators as of bailiffs, aldermen, or jurats, to whom it is wished to confine it. It seems to me, therefore, that this case being within the general mischief, is within the general remedy. I am fully sensible of the force of the observation, that it seems contrary to the spirit of the corporation law to permit any alteration of the original constitution given, or presumed to be given, by the crown. This is an observation calculated to strike all men the instant is made. But it is corrected by reflection and enquiry. You find upon examination, that the law does permit the body to alter its constitution for wise and salutary purposes. This has been done for ages, allowed by the Judges, united after mature deliberation, centuries ago, approved by many eminent lawyers in succession, and objected to by none. Who can deny that it is altering the constitution of a corporation, to deprive many electors of the right of electing all the officers of the corporation, from the highest to the lowest? Yet, it is acknowledged this may be done.

The question therefore is, whether this alteration is not justified by the like reason. It appears to me to be so.

What Lord *Mansfield* said in the case of *The King* v. *Spencer*, respecting bye-laws, may surely be applied with great truth to the electing corporators. His words are these, — " Where the power of making bye-laws is in the body at large, they may delegate their rights to a select body, who become the representative of the whole community." Here the body at large have delegated their right of electing burgesses to a select body, and the select body are, in that respect, the representatives of the whole community.

There remains to me but one objection more to notice. It is, that this bye-law is so contrived, that it will

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will not probably be revoked. The select body will so manage as to be at all times the majority of the burgesses, and so preserve the power which the bye-law has placed in their hands. My Lords, I confess that, although this is but speculation, I do not consider it as any disadvantage. If it was beneficial to enact this law, if its effect is useful, it would seem that its endurance should be beneficial too. The acknowledged principle which has hitherto supported every bye-law of the kind, when enacted by competent authority, is the preservation of order in the community, and the exclusion of riot and commotion. The same principle should lead us to consider any regulation which has a tendency to produce that effect permanently, as the more meritorious on that account.

On *Wednesday*, *July* 21st, the question was put to their Lordships, in the absence of the *Lord Chancellor*, by

Lord TENTERDEN C. J. My Lords, there is a case which stands for your Lordships' judgment, of *The King* v. *Westwood*, which was brought up to this House by writ of error from the judgment of the Court of King's Bench.

The record is of this nature: it is a proceeding by information in the nature of a writ of *quo warranto*, calling on the defendant to shew by what authority he claims to be a burgess of the borough of *Chepping Wycombe*.

The defendant has alleged, that the borough of *Chepping Wycombe* has been a borough from time immemorial, consisting of a mayor, bailiffs, and an indefinite number of burgesses.

It appears also by the record, that His Majesty King *Charles* the Second granted a charter to this corporation,

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in the name of the mayor, bailiffs, and burgesses, and that in that charter there is a clause whereby the mayor, bailiffs, and burgesses of the borough, and their successors, or the major part of them, from time to time, for ever, should and might be able to select so many and such other men, inhabiting or not inhabiting within the borough, as to them should seem most expedient, to be burgesses of the said borough. In this charter there is also a power to make bye-laws, which is expressed in these terms: "And the said king did thereby grant and confirm to the said mayor, bailiffs, and burgesses, that the aldermen and bailiffs should be and be called the common council of the borough; and that they and their successors, for the time being, or the major part of them, (of whom the mayor for the time being the said late king willed to be one,) might and should have full power and authority to frame, constitute, ordain, and make, from time to time, such reasonable laws, statutes, and ordinances whatsoever, as to them should seem to be good, wholesome, useful, honest, and necessary, according to their sound discretion, for the good rule and government of the burgesses, artificers, &c. inhabitants of the borough aforesaid, for the time being, and for declaring in what manner and order the aforesaid mayor, aldermen, bailiffs, and burgesss, and the artificers, inhabitants, and residents of the borough aforesaid should behave, conduct, and carry themselves in their offices, mysteries, and business within the same borough, and the limits thereof, for the time being, and otherwise for the further good and public advantage and rule of the same borough."

The Defendant then further avers, that a bye-law was made by the body at large, — not the select body, to whom the power of making bye-laws is given by the charter, but by the body at large, — by which it is directed,

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directed, "That from thenceforth the mayor and common council of the borough, or the major part of them, duly assembled together for that purpose within the said borough, should and might from to time, and at all times thereafter, by themselves, and without the concurrence or assistance of the rest of the burgesses of the said borough, elect and choose such person or persons to be a burgess or burgesses of the same borough as to them, the said mayor and common council of the said borough for the time being, or the major part of them so assembled as aforesaid, should seem meet." The Defendant then proceeds to allege that he was elected to the office of a burgess by the mayor and common council of the borough, — not by the whole body of mayor, bailiffs, and burgesses, but — by that particular body, the select body.

The charter of *Charles* the Second is referred to in another part of the proceedings, and inasmuch as that charter contains a clause enabling the corporation at large to elect the burgesses, the Defendant has on one part of the record alleged, that the corporation did not accept the charter as to that part of it under which the power of electing the burgesses is claimed by the body at large.

Two questions of law, therefore, have arisen upon this record; the first, whether it is competent to an existing corporation, to whom a charter of the crown is offered, to accept that charter in part and reject it in part; or if it accept it in part, whether that must not be taken to be an acceptance of the whole? Upon that point there never has been any difference of opinion among the learned Judges. There are, indeed, to be found some expressions of Judges in former times importing that a corporation might accept part of a charter and reject the remainder; but of late times all Judges have been of opinion that that is not open to a corporation; otherwise a corporation might reject the obligation which was imposed,

imposed, and accept the benefit which was conferred upon them; and accordingly there was judgment in the Court below for the crown upon that point, namely, that the allegation that the charter was accepted in part was a bad allegation.

Another question made on this record was, Whether the bye-law which I mentioned to your Lordships, and which your Lordships observe was made by the body at large, giving the power of electing burgesses to the select body, was or was not a good bye-law. Upon that question there has been a difference of opinion; there was a difference of opinion in the Court of King's Bench, and there was a difference of opinion expressed by the learned Judges on answering the questions put to them by your Lordships. A very considerable majority, however, of the Judges have been of opinion, that this bye-law is a good bye-law: it was held so by a majority of the Judges in the Court of King's Bench; the learned Judges distinctly gave that opinion; and I have to state, that having been one of the Judges who, on the first occasion felt a great doubt, I have now arrived at the conclusion, that the opinion of the majority of the Judges is well founded.

That question arises in this way. It is admitted on the pleadings, that the corporation of *Chepping Wycombe* has existed from time immemorial. To such a corporation it is incident, that the whole body should have the power of continuing itself, and giving itself perpetual existence, which is incident to a corporation; but, inasmuch as in this charter of *Charles* the Second, a special power of making bye-laws is given not to the body at large, but to a select body, it became a question, whether that might not, by implication, take away the power of making bye-laws which had previously existed in the body at large? But the majority of the Judges, upon a view of this bye-law, and upon considering its terms very

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very maturely, have been of opinion that the charter did not give the power of making bye-laws for the election of burgesses to the select body, so as, by implication, to prevent the body at large from making the bye-law in question. That was a question, certainly, of great importance. I, myself, as I have stated, entertained considerable doubt upon it when the question was before the Court. A majority of the Judges, however, have been of opinion, that the power of making bye-laws by the select body, not being inconsistent with the power of making bye-laws in the body at large on the subject of the election of burgesses, that power was not taken away. I have had some communication with my Lord Chancellor upon the subject, and I find he is also of that opinion; and, upon a full consideration, my Lords, I have also come to the same conclusion. I should intimate to your Lordships, that some few of the learned Judges were of opinion, that such a bye-law could not, under any circumstances, be good; that is, that the corporation at large could not, under any circumstances, transfer the power of electing from themselves to a definite portion of their body. There have been, however, so many decisions upon this point, and so many bye-laws have been held to be good, which, if this were bad, would be also open to objection, that I have no difficulty in saying, that, (referring to the particular charter of this corporation,) I concur in the opinion of the majority of the Judges, and of my Lord Chancellor, that this is a good and valid bye-law, as it was held in the Court below to be. I therefore recommend to your Lordships, to affirm the judgment of the Court below.

Judgment affirmed.

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Imperial Gas Company *v.* CLARKE and Others.

Nov. 8.

Defendants, sued by a corporation for making, while directors, false entries in the books of the corporation, Held not entitled to inspect the books of the corporation; at all events, not without an affidavit that such inspection was necessary to their defence.

THIS was an action against the Defendant for alleged misconduct, in making false entries and false returns in the books of the Imperial Gas Light Company, a corporate body, at a time when the Defendants were acting in the capacity of directors. The declaration did not disclose the specific entries complained of, and there was no particular delivered.

Taddy Serjt., on affidavit of these facts, had obtained a rule *nisi* for the Defendants to be permitted, from time to time, to inspect the books of the Company, and take such copies as they thought fit.

Wilde Serjt. opposed the rule, on the ground that the Defendants had established no necessity for such general access to the Plaintiffs' sources of evidence, and that no decided case had gone to such a length; the principle being, that one party could only be compelled to disclose to the other documents wh'ch he might be considered to hold as a trustee for both. *Ratcliff* v. *Bleasby* (*a*), *Rowe* v. *Howden* (*b*), *Rundle* v. *Beaumont*. (*c*) He offered, however, that a letter from the Plaintiffs' attorney, stating the items of the Plaintiffs' charge, should be considered as a particular, and that details should be given of an item for the year 1824, — "Sundry accounts debtor to coke, 6700*l*."

(*a*) 3 *Bingh.* 148. (*b*) 4 *Id.* 539. (*c*) *Ib.* 537.

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Taddy. (*Andrews* Serjt. was with him.) The case of a corporation is an exception, and all parties concerned are entitled to the inspection of corporate books, for the purpose of seeing bye-laws or entries made while they were members of the company.

TINDAL C. J. The Defendants require too much; and their affidavit does not disclose any thing to entitle them to what they seek at the hands of the Court. The general rule, no doubt, exempts a party from producing papers to his opponent, unless he can be considered to hold them in the character of trustee. But there are exceptions to the rule; and in the case of corporations a party has been entitled to have access to bye-laws, and the like. The Defendants, however, have not deposed that they are unable to conduct their defence without access to the books of the company; and, for aught that appears to the contrary, they may have in their recollection all the particulars with which they now require to be furnished. They ought to have shewn that there was something in the books essential to their defence. If the attorney's letter be considered as a particular, and the details of the item of accounts in 1824 be given, as proposed, I think enough has been done. I am unwilling to extend the rule for compelling a party to allow inspection of documents in his possession.

Rule discharged on the terms proposed.

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TREGONING, Assignee of JENNER and SOPPETT, Bankrupts, *v.* ATTENBOROUGH.

Nov. 8.

TROVER for silks. At the trial before *Tindal* C. J. *London* sittings after *Trinity* term, the bankrupt *Soppett* stated that the Defendant, a pawnbroker, had twice supplied him when in distress with 200*l.* upon a deposit of silks; and upon the second occasion made out an invoice, as if the goods had been sold to him, and took a receipt for 200*l.*

In his books the Defendant had described the transaction as consisting of several advances, each of less than 10*l.*, and in the whole amounting to the sum received by *Soppett*. No direct stipulation was proved for any specific rate of interest.

On the part of the Plaintiff it was contended, that the transaction was usurious, and designed to elude the Pawnbrokers' Act.

The Chief Justice left it to the jury to find whether the goods had been deposited on a contract to pay more than 5 per cent. interest for money advanced; and a verdict having been given for the Plaintiff,

Andrews Serjt. moved to set it aside, on the ground that the evidence shewed rather a lawful pledging, under the Pawnbrokers' Act, than a contract for usurious interest; and that at all events the parties being in *pari delicto*, the Defendant was entitled to retain the goods. In *Fitzroy* v. *Gwillim* (*a*), it was held, that before a party can entitle himself by a civil action to relief from an usurious contract he must tender all the money really advanced. The parties being in *pari delicto*, *potior est*

A pawnbroker advanced 200*l.* to a trader in distress, upon a deposit of silks, and entered the transaction in his books as several advances, each of less than 10*l.*, but amounting in the whole to 200*l.*

The trader having become bankrupt, and his assignee having sued in trover for the silks, the Court refused to disturb a verdict found for the Plaintiff upon a direction to the jury to find whether the goods had been deposited on a contract to pay more than 5 per cent. interest.

(*a*) 1 *T. R.* 153.

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conditio possidentis. [*Tindal C. J.* That case has been looked on with great suspicion for many years, if not actually over-ruled; besides it was treated by Lord *Mansfield* as if it had been an action for money had and received; for he begins by saying, "This is an equitable action." But trover is an action of strict law.] The principle seems to have been acted on in *Hindle* v. *O'Brien.* (*a*) [*Gaselee J.* That was an application to the equitable jurisdiction of the Court.]

TINDAL C. J. It was the province of the jury to decide with what object the goods were deposited in the hands of the Defendant, and it was left for them to say whether there was any contract for interest at more than 5 per cent. The Pawnbrokers' Act is out of the question, because it only sanctions advances to the extent of 10*l.* And the case of *Fitzroy* v. *Gwillim* can scarcely be supported in point of law, because under the statute of *Anne* every contract for more than 5 per cent. interest is absolutely void; and if the jury find this contract to have been such, the Defendant can have no right to retain the goods in question.

PARK J. This is an attempt to elude the provisions of the Pawnbrokers' Act; but in *Cowie* v. *Harris* (*b*), Lord *Tenterden* held, that where a pawnbroker received a parcel of goods on one day, and on that and several subsequent days advanced sums of money, each not exceeding 10*l.*, as on different parts of the parcel, and received pawnbroker's interest of 3*d.* in the pound per month on those sums, it was a question for the jury, whether that really were one transaction, and a mere contrivance for obtaining the higher interest on the whole sum, in which case it was void; or whether the advances were really distinct.

(*a*) 1 *Taunt.* 413. (*b*) 1 *M. & M.* 141.

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GASELEE J. The case was properly left to the jury, and there seems to be no ground for interfering. *Fitzroy* v. *Gwillim* always struck me as an erroneous decision.

BOSANQUET J. I am of the same opinion. In trover the question is one of strict legal title; and if the contract be usurious, the Defendant's title fails.

Rule refused.

BROAD *v.* THOMAS.

Nov. 9.

ASSUMPSIT for work and labour as a ship-broker.

Semble, that by the usage of trade a ship-broker is not entitled to charge a ship-owner for his trouble in procuring a charterer for the ship, where the contract is not completed, though it be broken off by the owner.

The Defendant had employed the Plaintiff to procure a charter for the ship *Betsy*. The Plaintiff found one *Emden* who was willing to charter the *Betsy*, and signed a paper containing the terms for which the ship was to be hired; but before the charter-party could be drawn up the Defendant refused to go on in the business, whereupon the Plaintiff commenced this action to obtain payment for his trouble.

At the trial before *Tindal* C. J., *London* sittings after *Trinity* term, witnesses were called on both sides to shew what was the mercantile usage in such a case. Their testimony was conflicting; but the more respectable stated that the broker was entitled to no remuneration in such a case. The Chief Justice thought that the Defendant had a right to exercise an option whether he would engage with the proposed charterer or not; and that as no charter-party was signed, there was no contract to bind the Defendant.

He left it, however, to the jury to determine whether there were any, and what custom, in such a case.

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A verdict having been found for the Defendant,

Taddy Serjt. moved for a new trial, on the ground that, whatever the custom might be when the contract was broken off by unavoidable accident, the broker ought to be remunerated for his trouble where the business was broken off by the Defendant himself, without assigning any reasonable cause; and that, therefore, the jury should have been directed to enquire whether the Defendant's refusal to proceed in the charter-party with *Emden* had been reasonable or unreasonable. In *Hamond* v. *Holiday* (*a*), it was laid down by *Best* C. J. that if the duties of a sworn broker be executed in such a manner that no benefit results from them, he is not entitled to recover either his commission or even a compensation for his trouble. Here the Plaintiff procured for the Defendant the benefit of a contract with the charterer; for *Embden* was bound to proceed if the Defendant required him.

TINDAL C. J. If the question were again to go before a jury, it must be left to them on the custom. The rate of payment in contracts of this kind which are brought to a conclusion, seems to be higher than would be requisite as an equivalent for the trouble of conducting the particular transaction. It is probably on that ground that the custom has arisen to allow nothing when the contract is incomplete.

Rule refused.

(*a*) 1 *Carr. & P.* 384.

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WAYMAN *v.* HILLIARD.

Nov. 9.

ASSUMPSIT by an off-going against an in-coming tenant, upon an agreement by the latter to allow the former for all crops sown before a certain day. There was also a count upon an account stated.

Plaintiff demanded 40*l.* upon an agreement by defendant, an incoming tenant, to pay for growing crops: the Defendant offered to pay 17*l.*: Held, no evidence to support a count upon an account stated.

At the trial before *Littledale* J., last *Cambridge* assizes, it appeared that the crops, of which the Defendant had had the benefit, were sown chiefly after the day stipulated in the agreement. However, upon the Plaintiff's demanding 40*l.* previously to the commencement of his action, the Defendant offered to give 17*l.*, and this was relied upon as evidence in support of the count upon the account stated: *Littledale* J., however, being of opinion that it did not amount to an account stated, a verdict was found for the Defendant, which *Storks* Serjt. now sought to set aside, and to obtain a rule for a new trial, on the ground that the offer to pay 17*l.* amounted to an account stated. He relied on *Knowles* v. *Mitchel* (*a*), where an admission by a defendant that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, was held sufficient to support a count upon an account stated.

TINDAL C. J. This would carry the principle of an account stated far beyond any of the decided cases. In *Knowles* v. *Mitchel* certain trees had been felled, to which the defendant expressly referred. Here there has

(*a*) 13 *East*, 249.

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been no reference to any particular item of account, nor any admission of a debt. The Defendant has merely offered to pay money; and for aught that appears, it might only have been for the purpose of preventing a suit.

PARK J. In all the cases of account stated there has been an acknowledgment of a debt. Here the Defendant has merely offered a sum of money to escape from an action.

GASELEE J. This is nothing like an account stated. In *Knowles* v. *Mitchel* the question was, whether there could be an account stated where the subject of the demand consisted of only one item. But in *Highmore* v. *Primrose* (*a*) there were several items; and it was held that an acknowledgment of one was sufficient to support an account stated.

BOSANQUET J. In saying that this did not amount to an account stated, I do not controvert the principle that an absolute acknowledgment of debt may amount to an an account stated. But there has been no acknowledgment of debt here; the Defendant merely makes an offer to purchase peace.

Rule refused.

(*a*) 5 *M.* & *S.* 65.

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SAYER, Assignee of CORT, a Bankrupt, *v.* GARNETT.

Nov. 9.

A bankrupt cannot be called as a witness to explain an act which may defeat his commission.

AT the trial of this cause before *Tindal* C. J., *London* sittings after last term, the Defendant proposed to call the bankrupt to explain an act which the Plaintiff relied on as an act of bankruptcy.

His testimony, however, having been rejected, and a verdict having been given for the Plaintiff,

Taddy Serjt. moved for a new trial, on the ground that the bankrupt ought to have been received as a witness.

He admitted that the bankrupt's interest in the surplus of his property, and the criminality, in ancient times, of an act of bankruptcy, had been held a sufficient ground for excluding him as a witness in support of the commission. *Oxlade* v. *Perchard* (*a*), *Hoffman* v. *Pitt* (*b*), *Chapman* v. *Gardner* (*c*), and *Flower* v. *Herbert*, there cited; *Morgan* v. *Pryor*. (*d*) But in *Binns* v. *Tetley* (*e*), *Hullock* B. seemed to consider the practice as anomalous. And in *Oxlade* v. *Perchard*, Lord *Kenyon* held, that though the bankrupt's criminality may preclude him from supporting the commission, there cannot be the same objection to his impeaching it, or at least to his explaining a doubtful act.

TINDAL C. J. We ought not lightly to set aside the general understanding of the profession, and the rule laid down in text books, that a bankrupt is not an ad-

(*a*) 1 *Esp.* 287.
(*b*) 5 *Esp.* 22.
(*c*) 2 *H. B. C.* 279.
(*d*) 2 *B. & C.* 15.
(*e*) *M'Lell & Young*, 397.

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missible witness to set up or defeat his own commission. It has been urged that if his interest excludes him from being a witness in support of the commission, he ought to be permitted to impeach it, or to explain a doubtful act. But this does not necessarily follow. He has, indeed, frequently an interest in supporting the commission; but he has also as frequently an interest in defeating it where such is his object and desire. With respect to authority, *Binns* v. *Tetley* has expressly laid it down, that when the bankrupt is called, he cannot be cross-examined to defeat the commission; and if so, he cannot be called directly for that purpose. The inconvenience of a different practice would be very great. The bankrupt would be called to make statements often resting on his own knowledge alone, and the proceedings under commissions would be rendered generally insecure. My decision, however, rests on the universal practice in cases of this kind, and on the last decision which has been referred to.

PARK J. I am of the same opinion. Lord *Kenyon* changed the opinion which he expressed in *Oxlade* v. *Perchard*, and held that there was no valid distinction between calling a bankrupt in support of his commission, and calling him to defeat it; for he may as often have an interest to defeat as to support it. But independently of that, the continual practice of *Westminster Hall* is strong evidence of the law; and as *Hullock* B. says, in *Binns* v. *Tetley*, though the cases on the subject are *Nisi Prius* cases, all the Judges have followed them, not because they were good decisions, but because they *were* decisions.

GASELEE J. Except in *Oxlade* v. *Perchard* it has always been held that a bankrupt cannot be examined either to support or defeat his commission; and the Court of Exchequer

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chequer has recently decided, that he cannot be cross-examined with that view. It would be dangerous to raise a doubt on the point by granting even a rule *nisi*.

BOSANQUET J. I am of opinion that we ought not to grant the rule, which would only have the effect of calling in question a practice long established.

Rule refused.

FOSTER and Another *v.* CHARLES.

Nov. 10.

SEE the pleadings and facts of this case, *ante*, vol. vi. p. 396.

Upon a new trial, *Tindal* C. J. told the jury that if the Defendant made representations concerning *Jacque*, the tendency of which was to occasion loss to the Plaintiff, knowing such representations to be false, and intending thereby to benefit himself, he was guilty of fraud in the common acceptation of the term; if he made such representations, knowing them to be false, without proposing thereby any advantage to himself, but proposing, perhaps, to benefit a third person, he was guilty of fraud in the legal acceptation of the term, and responsible to the Plaintiff for any injury resulting from such representations.

The jury, thereupon, found for the Plaintiff, damages 800*l.*; but added, "We consider there was no actual fraud on the part of the Defendant, and that he had no fraudulent intention, although what he has done constituted a fraud in the legal acceptation of the term."

1. In an action against a Defendant for an injury occasioned to the Plaintiff by a servant whom the Plaintiff has been induced to employ through the false statements and deceptious suppressions of the Defendant, it is not necessary for the Plaintiff to shew that the falsehood of the Defendant was accompanied with an intention to injure the Plaintiff.

2. The Judge having explained to the jury the distinction between fraud in fact and fraud in the legal acceptation of the term, and the jury having found for the Plaintiff, and having added, that there was no fraudulent intention in the Defendant, but that he had committed a fraud in the legal acceptation of the term, the Court refused to enter the verdict for the Defendant.

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Jones Serjt. now contended that this amounted to a verdict for the Defendant; and therefore moved that the verdict might be entered for him, instead of the Plaintiff.

He urged, at some length, nearly the same arguments as he had advanced on a former occasion, and adverted to the same authorities; (see *ante*, vol. 6. p. 402.) contending that this action was substituted for the ancient writ of deceit; that the gist of the action was a fraudulent intent on the part of the Defendant to injure the Plaintiff, by deceiving him; that a defendant was not responsible for the consequences of a statement, merely because he knew it to be false; he was not responsible for the consequences of a bare lie: in order to render him responsible, it ought to be shewn that he intended to defraud the Plaintiff of something by the deceit he had practised. That if a party were responsible for the consequences of a lie told without any intention to defraud the hearer of something, no line could be drawn, and parties might be called on to answer for those excusable untruths, which were sometimes told for the purpose of avoiding a greater mischief.

TINDAL C. J. No sufficient ground has been laid to induce us to to disturb the verdict which has been found for the Plaintiff. The application arises on a misconception of what the jury have found. They first deliver a verdict for the Plaintiff with damages, and then add, that in point of fact they consider the Defendant had no fraudulent intention, although he had been guilty of fraud in the legal acceptation of the term.

Their attention had been drawn by me to two classes of motives possible on the part of the Defendant; first, a desire to benefit himself by making a statement which he knew to be false; secondly, a desire to benefit some third person; and I stated that, although there might be

be no intention on his part to obtain an advantage for himself, it would still be a fraud, for which he was responsible in law, if he made representations productive of loss to another, knowing such representations to be false.

The jury in finding that he had no intention to defraud mean only that he was not actuated by the baser motive of obtaining an advantage for himself, but that he was guilty of fraud in law by stating that which he knew to be false, and which was the cause of loss to the Plaintiff.

The question, therefore, is, whether, if a party makes representations which he knows to be false, and occasions injury thereby, he is not liable for the consequences of his falsehood?

It would be most dangerous to hold that he is not.

The confusion seems to have arisen from not distinguishing between what is fraud in law and the motives for actual fraud. It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad: the person who makes such representations is responsible for the consequences; and the verdict, therefore, in this case ought not to be disturbed.

PARK J. I am of the same opinion. In what fell from this Court in the case of *Tapp* v. *Lee*, and upon the former decision of the present case, the doctrine has been laid down most accurately. It would be unfair to take the expressions of the jury, without connecting them with what the Chief Justice had just presented for their consideration. It is clear that the jury meant to draw the distinction between the sordid motive of personal advantage and the legal fraud which might be committed by a representation false within the knowledge

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ledge of the speaker, although made without any view to his own advantage. For such a representation the Defendant is responsible, if mischief ensues, whatever may have been his motive; and as to its being necessary to prove the motive by which he was actuated, when this case was last before the Court, *Tindal* C. J. said, "I am not aware of any authority for such a position, nor that it can be material what the motive was; the law will infer an improper motive, if what the Defendant says is false within his own knowledge, and is the occasion of damage to the Plaintiff."

Here the Defendant said, "That his friend was so excellent a young man, that he would rather trust him without security than most men with:" when he knew the contrary to be the fact, he was guilty of a fraud in law in making such a representation; and fraud in law is sufficient to support this action.

GASELEE J. When this verdict is taken in connection with the direction of the Chief Justice, there is an end of all doubt as to the meaning of the jury, and the finding is a perfect finding. What the jury meant by actual fraud was a sordid regard to self-interest; but the legal fraud, which is sufficient to sustain the action, was complete when the intention to mislead was followed by actual injury.

BOSANQUET J. There seems to me to be no reason for disturbing this verdict. In the course of the trial, it is probable that improper motives had been ascribed to the Defendant. The Chief Justice, therefore, stated to the jury, and stated correctly, that motives of that description in the Defendant were not essential to the Plaintiff's action. If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud in law. Coupling that

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that with what the Chief Justice addressed to the jury, their verdict only means, that the Defendant did not propose to benefit himself, perhaps intended to benefit another; but that what he said, intending to benefit another, was false within his own knowledge, injurious to the party who received the communication, and, consequently, a fraud in the legal acceptation of the term,

Rule refused.

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Nov. 11.

A *sci. fa.* must lie four juridical days in the office; and *Holy Thursday* is not a juridical day, although the office be open upon paying an extra fee.

WILDE Serjt. had obtained a rule *Nisi*, to set aside a *ca. sa.* in this case, because a *scire facias* preceding it had not lain four juridical days in the office. It lay from *Tuesday* to *Friday*, but the intervening *Thursday* was *Holy Thursday*, a *dies non*. The sheriff had been directed to return two *nihils* without giving any notice of the writ.

Taddy Serjt. shewed cause on affidavit, which stated, that though the doors of the office were closed on *Holy Thursday* yet the clerks were in attendance, and the books might be searched as on other holidays upon payment of a fee.

He contended that this was sufficient, because search could be made. *Aliter* if *Sunday* had been one of the four days, because on *Sunday* no search could be made. *Howard* v. *Smith.* (*a*)

Wilde Serjt. *Holy Thursday* must be considered in the same light as *Sunday*, 5 & 6 *Ed.* 6. *c.* 3. The bail

(*a*) 1 *B.* & *A.* 528.

should

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should have four business-days on which to search the office, without any extra charge. *Wathen* v. *Beaumont*. (*a*)

TINDAL C. J. The object of the rule is, that the bail should have four days on which to go freely, and search the office to see if any writ be lodged. The Plaintiff only says that the office was open as on other holidays, and the cases shew that on other holidays it is open only on payment of an additional fee. But it was intended that the bail should have four days without any extra burthen. These cases in which the sheriff is ordered to return *nihil* ought to be narrowly watched.

Rule absolute.

(*a*) 11 *East*, 271.

Nov. 12.

DOUBLEDAY *v.* MUSKETT and LOUSADA.

Defendants consented to become directors, bought shares, and attended meetings of a projected water company, for which an act of parliament was to be obtained: Having done no act to divest themselves of their interest in the concern,

Held, that though no act of parliament was obtained, and the project failed, they were responsible for works ordered at subsequent meetings of the projectors which the defendants did not attend.

ASSUMPSIT for work and labour performed by the Plaintiff, as an excavator, under the following circumstances: —

In *August* 1825 a company was projected for the purpose of supplying the town of *Brighton* with water; and the following resolutions were come to at a meeting held for that purpose on the 9th *September* 1825: —

"Resolved, That a Company be formed for the better supplying with water the inhabitants of the several parishes of *Brighthelmstone*, *Hove*, *Preston*, *Ovingdean*, and *Rottingdean*, in the county of *Sussex*, to consist of the

several

several persons now present, and such others as shall become subscribers, subject to the regulations now and hereafter to be made. That the said company be called The *Brighton* Water Company. That for the purpose aforesaid, *Hollis Solly* and *E. H. Creasy*, now present, be a committee of the directors of the said company, together with Major *V. Russell*, *J. B. Lousada*, and *J. A. Muskett* (if they accept such appointment), for the general management of the affairs of the said company. That *Hollis Solly*, Esq. be the chairman of the said company of directors. That Major *Russell* be the deputy-chairman. That Messrs. *Tamplin* and Co. be the treasurers or bankers of the said company. That Mr. *George Chapman* be the clerk and solicitor of the same. That application to parliament be made in the ensuing session for a bill to carry into effect the said undertaking; and that the solicitor do give the usual and necessary notices."

In pursuance with these resolutions, the Defendants were applied to, and consented to become directors of the proposed company. They also paid instalments upon the number of shares required to qualify them for becoming directors; and the following were the minutes of two meetings held on the 17th of *September*: —

"Present, *Hollis Solly*, *E. H. Creasy*, Major *Russell*, *B. Gregory*, *J. B. Lousada*, *Charles Gell*, *G. A. Muskett*, *G. Chapman*.

"Resolved, That the minutes of the meeting held on the 9th day of *September* instant be confirmed. That the sum of 100,000*l.* be subscribed in 1000 shares of 100*l.* each, and that the sum of 2*l.* 10*s.* per share be paid into the hands of the treasurers at the time of subscribing. That twenty shares be the qualification or number to be held by each person in the direction. Signed, *H. Solly*, chairman."

"At an adjourned meeting held the same day, present, Major

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Major *Russell*, *Charles Gell*, *E. H. Creasy*, *George Chapman*, and *G. A. Muskett*; Mr. *Chapman* reported to the meeting, that having seen Mr. *Kemp* this day since the former meeting, Mr. *Kemp* consented that a trial for water should be made by the company on *White Hawke Hill*, without any charge on his part for the same."

The Defendant *Muskett* was present at a meeting held on the 19th of *September*, at which it was resolved, that a trial should be made for water on *Hawke Hill*, and that an instalment of two and a half per cent. should for that purpose be paid on the shares of each director.

The Defendant *Lousada* was also present at a meeting held on the 28th of *October*, at which a letter from the engineer was read, stating that he was not prepared with his report. Neither of the Defendants attended any subsequent meeting.

A meeting was held on the 30th of *December*, at which the engineer reported that water had been found: he gave an estimate of the expense of the undertaking; and was directed to prepare a specification for excavating and forming a reservoir.

Early in *January* 1826 the following advertisement appeared in the *Brighton* newspaper: —

"*Brighton Water Company.*—To navigators, diggers, and others. The directors of the *Brighton* Water Company are ready to receive proposals for excavating and removing the earth and chalk for forming one or more reservoirs. Particulars may be had between the hours of ten and twelve in the forenoon, at the office of Mr. *Chapman*, solicitor, No. 1. *Dorset Gardens*, where the plan and specifications may be seen. The tenders are required to be delivered on or before the 13th instant.

"*Brighton*, 3d *January* 1826."

At

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At a meeting held on the 16th of *January*, the Plaintiff's tender was received; and the following prospectus of the objects of the company, headed, "The *Brighton Water Company*," was ordered to be published. After giving the names of the directors, amongst whom were the two Defendants, the engineer, and the solicitor, it stated, among other things,

"That a company had been formed for the ample supply of *Brighton* and its vicinity with pure and uncontaminated water;

"That the *Brighton* Water Company had been successful in obtaining an abundant supply of water from a spring, into which they had already sunk a shaft, in the immediate vicinity of the town; and were rapidly proceeding in the construction of reservoirs and other requisite works, on the establishment of which they had agreed for the purchase of ample plots of freehold ground, in situations the most advantageous, and at such an elevation as would enable them to supply the whole town;

"That application would be made to parliament in the then session, for leave to bring in a bill to regulate and establish the company, for which proper notice would be given;

"That the undertaking consisted of 1000 shares; and that towards the disbursement for the lands agreed for, and for every expense of completing the works requisite for the supply of *Brighton*, according to the plans and estimates of the company's engineer, including such mains as should allow of their future extension, the capital proposed to be raised was 25,000*l.*, being 25*l.* per share, of which 2*l.* 10*s.* per share was payable at the time of subscribing, and the remainder by quarterly instalments. That a discount of 5*l.* per cent. per annum would be allowed to any proprietor choosing to pay his instalment in advance;

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"That a proprietorship of twenty shares should be a director's qualification."

At a meeting held on the 30th of *March* 1826, it was resolved, that the Plaintiff should proceed with the execution of the reservoir at 11*d.* per square yard as agreed on, and that he should be paid at that rate for 4000 yards already completed.

No act of parliament was ever obtained; the project, like many others of the same date, fell to the ground; and the Plaintiff now sought to recover his demand from the Defendants, as directors of the projected concern.

At the trial of the cause, *Sussex* Summer assizes 1829, *Gaselee* J. told the jury, that the only question for them was, whether the Defendants had become directors; for if they had, they were liable to the Plaintiff, unless they could shew that they had done any act to divest themselves of their responsibility. Verdict for Plaintiff, 598*l.*

Wilde Serjt., in *Michaelmas* term 1829, obtained a rule *nisi* to set aside this verdict and enter a nonsuit instead, or for a new trial, on the ground that there was no evidence of the Defendants having given any order to the Plaintiff, or having concurred in any resolution for employing him.

The case stood over till the case of *Fox* v. *Clifton* (*ante*, vol. vi. p. 776.) should have been heard; and now

Taddy and *Jones* Serjts. shewed cause. They relied on the circumstances of the Defendants having accepted the situation of directors of the projected company; having attended meetings; and having purchased the number of shares requisite to qualify them as directors. If the persons who held themselves out to the world as the directors of a concern like this were not to be respon-

responsible to parties employed in the concern, such parties would be without remedy.

Wilde. (*Spankie* and *Andrews* Serjts. were with him.) The Defendants consented to become directors of a concern, which was to be sanctioned and regulated by an act of parliament; not a trading company, but a project connected with real property. No such act was ever obtained. The concern, therefore, in which the Plaintiff was employed, was not the concern of which the Defendants had consented to become directors. The meetings attended, and the shares purchased by them, were meetings and shares of an inchoate and incomplete undertaking; and the parties engaged in such an undertaking are only responsible so far as they personally interfere and move in it. *Fox* v. *Clifton.* But the Defendants were never present at any meeting of this concern after *October*; the Plaintiff was not employed till the *January* following; and it does not appear that the Defendants so much as knew of the advertisement which produced his tender, or that any further steps had been taken since *October*. They had a right to presume that no expense would be actually incurred till the act of parliament should have been obtained. The Plaintiff is not without remedy; he ought to have sued the persons who actually gave him the order to proceed, and who signed the contract. It is a suspicious circumstance, that those persons are not so much as joined in the action.

TINDAL C. J. The question in this case is, whether the two Defendants entered into the joint contract for the labour in respect of which the Plaintiff seeks to recover. In order to establish that, it is not necessary to shew that they signed the contract; it is sufficient if they be shewn to have holden themselves out as

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responsible for it. The contract, if entered into at all, was entered into in *January* 1826, when the Plaintiff sent in a tender, in consequence of an advertisement which had appeared on the seventh of that month. It is important, therefore, to see whether the Defendants were, at that time, directors of the projected company, or permitted themselves to be held out as such to the world. That the directors were liable for the work in question, appears from the express terms of the advertisement: — "The Directors of the *Brighton* Water Company are ready to receive proposals for excavating and removing the earth and chalk, for forming one or more reservoirs. Particulars may be had at the office of Mr. *Chapman*, solicitor." If, therefore, the Defendants were directors at that time, they are clearly liable to the Plaintiff. It appears that in 1825 they had accepted the office of directors, had attended meetings, and had purchased the twenty shares necessary to qualify them to be directors; so that they were not merely directors, but concerned in interest. I put it, however, on the ground that they were clothed with the character of directors. Having been directors in 1825, what have they done since to divest themselves of that character? It was in their power to have declared off; but if they omitted to do so, they are in the condition of partners who, having quitted a business, allow their names to remain over a door, or otherwise hold themselves out to the world as responsible. It has been urged, that what was done was not authorised by them, because an act of parliament was never obtained; but the prospectus does not hold out that as the condition of the directors' responsibility, it merely announces that an act shall be applied for; a mode of regulating their concerns which would, no doubt, be convenient for such a body; but the works go on in the meanwhile, and how could

could the Plaintiff be aware that all this was done by those who had no authority, for want of an act of parliament?

If, therefore, the Defendants accepted the office of directors, and did nothing to divest themselves of that character, the question was properly left to the jury, and there is no reason for disturbing the verdict.

PARK J. I am of the same opinion. When it was formerly attempted to fix all persons whatever who were engaged in projects of this kind, the courts were at first inclined to lay down a rule which might be esteemed to occasion hardship; but in *Fox* v. *Clifton* the matter was fully considered, and the Chief Justice there stated all the three grounds on which a party should be held responsible. The second point established in that case goes the whole length of fixing these Defendants, namely, that they have held themselves out, or allowed themselves to be represented, as directors. Here the Defendants attended three meetings at *Brighton* after they had been appointed directors. The question, therefore, was properly left to the jury. After the Defendants had given themselves out as directors, the Plaintiff is invited by advertisement to do the works in question, and the Defendants express no dissatisfaction. That brings us to the last question, whether they ever divested themselves of the character of directors. There is no evidence whatever to shew that they took any steps for that purpose, or to absolve themselves from the liability they had incurred.

GASELEE J., not having been present during the argument, declined giving any opinion.

BOSANQUET J. I see no reason for disturbing this verdict. The learned Judge left it to the jury to say,

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whether the Defendants had accepted the office of directors. The Defendants, after being named as directors in the first proceedings of the parties concerned, consent to attend meetings, at which minutes are made, and shares appropriated; they must therefore be treated as directors. If so, have they since that time done any one act to signify their dissent, or their desire to withdraw from the concern? The object of the company was to supply *Brighton* with water. If the Defendants accepted the office of directors, and never withdrew from it, and the business done was within the scope of the direction, they were necessarily liable. I agree with the principle laid down in *Nockells* v. *Crosby* (*a*). There a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest; and after some subscriptions had been paid to the directors in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project; and it was held, that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without the deduction of any part towards the payment of the expences incurred.

It is not necessary to shew that the individuals sought to be charged, actually signed any contract. If they consented to be directors, or belonged to the board of management, they are responsible for the proceedings of the board.

Rule discharged.

(*a*) 3 *B.* & *C.* 814.

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(IN THE EXCHEQUER CHAMBER.)

ANGLE *v.* ALEXANDER. *Nov.* 13.

SLANDER. The declaration consisted of several counts, and a general verdict was given for the Plaintiff below; upon which the Defendant below brought a writ of error, on the ground that the last count, at least, was bad; and if so, the verdict could not stand, having been given on all the counts.

In the first count, the Plaintiff alleged that he was a keeper of livery stables, and carried on the trade and business of a livery stable keeper; and complained, in that and the three following counts, that the Defendant had charged him with insolvency and theft.

The last count was as follows: — And whereas, also, before the time of the committing the grievances hereinafter next mentioned, one *John Peer* had become a bankrupt, and the said Plaintiff was about to prove a debt justly due to him by the said *Peer*, under a commission of bankrupt theretofore awarded and issued against the said *Peer;* yet the said Defendant, well knowing the premises, but contriving to injure and damnify the said Plaintiff, and to cause it to be suspected and believed as aforesaid, on, &c. at, &c. in a certain discourse which he the said Defendant then and there had with the said Plaintiff of and concerning the matters in the introductory part of this count mentioned, and of and concerning him in his trade aforesaid, then and there in the presence of divers good and worthy subjects of this realm falsely and maliciously spoke and published of and concerning the said Plaintiff, and of and concerning the said matters last-mentioned, these

Slander. A count, after an inducement that one *J. P.* had become bankrupt, and that Plaintiff was about to prove a debt justly due under his commission, charged the Defendant with saying of the Plaintiff, in his trade of a livery stable keeper, and in a discourse touching the matters before mentioned, — "He is a regular prover under bankruptcies;" meaning that the Plaintiff was accustomed to prove fictitious debts under commissions:

Held ill, without a previous averment that the Defendant had been accustomed to employ the words in that sense.

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these other false, scandalous, malicious, and defamatory words following, that is to say, "You (meaning the said Plaintiff) are a regular prover under bankruptcy (meaning that the said Plaintiff was accustomed to prove fictitious debts under commissions of bankruptcy); you are a regular bankrupt maker; if it was not for some of your neighbours, your shop would look queer. It is all true, and you may bring as many actions against me as you like." By means of the committing of which several grievances by the said Defendant as aforesaid, he the said Plaintiff had been and was greatly injured in his good name, fame, and credit, and in his said trade and business, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours, and other good and worthy subjects of this realm, insomuch that divers of those subjects, to whom the innocence and integrity of the said Plaintiff in the premises were unknown, have, on occasion of the commission of the said grievances by the said Defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said Plaintiff to have been guilty of theft and dishonest practices, and to be in embarrassed circumstances and likely to become insolvent, and have, by reason of the committing of the said grievances by the said Defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse with him the said Plaintiff as they were before used and accustomed to have, and otherwise would have had.

The Court stopped *Platt*, who was to have argued for the Defendant below; and called on

F. Kelly to support this count.

The words must be taken in their ordinary sense. (Note to *Craft* v. *Boite* (*a*), and the cases there cited:

(*a*) 1 *Wms. Saund.* 242.

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Woolnoth v. *Meadows* (*a*) and *Roberts* v. *Camden* (*b*).) The words, that the Defendant below was a regular prover under bankruptcies, may have an innocent or an injurious sense: may mean that the Defendant below has been unfortunate in his credits, or that he is in the practice of proving fictitious debts under commissions, which, as all debts under bankruptcies must be proved on oath, amounts to a charge of perjury. It was for the jury to determine in which of the possible senses the words were used, and by their verdict the jury find that they were used in the injurious sense of imputing to the Plaintiff below a punishable offence; and as the words were accompanied with much vituperation, they could not be supposed to bear any other meaning. But this sense being ascribed to them, they are also injurious to the Plaintiff below as affecting his trade; for according to *Com. Dig. Action on the Case for Defamation* (D), 25. 27. the Plaintiff must be considered as affected in his trade by words which charge him with malpractice or deceit; for such a charge will disincline his customers to trust him.

TINDAL C. J. The Defendant below contends that one count of the declaration is bad; and an entire verdict having been given, if one count is bad, we cannot separate the damages, but the cause must go down to trial again on a *venire de novo*. And we are of opinion that the last count is bad. The preceding counts had stated that the Plaintiff carried on the trade of a livery stable keeper, and that the Defendant had charged him with theft and insolvency. The last count alleges, that *John Peer* had become a bankrupt, and that the Plaintiff was about to prove a debt justly due to him by *Peer* under a commission of bankrupt theretofore awarded

(*a*) 5 *East*, 463. (*b*) 9 *East*, 93.

and

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and issued against *Peer*. Yet the Defendant, well knowing the premises, but contriving to injure and damnify the Plaintiff, and to cause it to be suspected and believed as aforesaid, in a certain discourse which he had with the Plaintiff, of and concerning the Plaintiff, and of and concerning the matters in the introductory part of that count mentioned, and of and concerning him in his trade aforesaid, then and there, in the presence of divers good and worthy subjects of this realm, falsely and maliciously spoke and published of and concerning the Plaintiff, and of and concerning the said matters last-mentioned, these other false, scandalous, malicious, and defamatory words following, that is to say, "You (meaning the said Plaintiff) are a regular prover under bankruptcy," meaning that the said Plaintiff was accustomed to prove fictitious debts under commissions of bankrupt.

It is contended on the part of the Plaintiff below, that, coupled with the finding of the jury, these words amount to a charge of perjury, and that at all events they convey an imputation on him in the way of his trade.

And first, we think they convey no imputation on him in the way of his trade, within the principles of the decided cases. Those cases are, where the skill of the plaintiff has been impeached in vocations that require skill; or the quality of goods where he has been a dealer; or his honesty, as by alleging that he kept false books; or his solvency and credit. The charge in the present case might be as easily applied to a man out of trade as in.

Does the count then shew, that the Defendant below imputed to the Plaintiff below a crime punishable by law? First, the innuendo is larger than the natural meaning of the words; and the rule is, that an innuendo cannot enlarge the meaning of words, unless it be connected with

with some matter of fact before expressly averred. This comes nearest to the case of *Hawkes* v. *Hawkey* (*a*), where, in an action of slander, the plaintiff averred that he had in due manner put in his answer on oath, to a bill filed against him in the Court of Exchequer by the defendant (but did not proceed to aver any colloquium respecting that answer, with reference to which the words were spoken), and then alleged that the defendant said of him that he was foresworn; innuendo, that the plaintiff had *perjured* himself in what he had sworn in his aforesaid answer so filed against him. It was held that the innuendo could not, without the aid of such a colloquium, enlarge the sense of the words, by referring them to the answer averred in the prefatory part of the declaration to have been put in.

So, here, without an averment that it had been a practice with the Defendant, by the words complained of, to impute the proof of fictitious debts under commissions of bankruptcy, the innuendo cannot be supported. In *Woolnoth* v. *Meadows* and *Roberts* v. *Camden*, the meaning of the words appeared on the record, and they plainly imputed a crime; so that the action would have been sustainable as well without as with an innuendo.

There must be a

Venire de novo.

(*a*) 8 *East*, 427.

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Nov. 19.

ROE dem. DURANT *v.* MOORE.

Under 1 *G.* 4. *c.* 87. *s.* 3. the Defendant in ejectment must give two additional sureties on bringing error, although he has before given two sureties on commencing the action.

THE Defendant, a tenant of the lessor of the Plaintiff under an agreement in writing, having held over after notice to quit, this ejectment was brought against him, and upon an application to the court, pursuant to 1 *Geo.* 4. *c.* 87. *s.* 1. the Defendant, besides entering into the common rule, and giving the common undertaking, had undertaken, in case a verdict should pass for the Plaintiff, to give the Plaintiff judgment of the term preceding the trial, and had entered into a recognizance, by himself and two sufficient sureties in a reasonable sum, to pay the costs and damages which should be recovered by the Plaintiff.

The cause was tried, and a verdict found for the Plaintiff, at the last *Shrewsbury* assizes.

Immediately afterwards, on the 11th of *August*, a writ of error was sued out and allowed; and on the 12th the Defendant entered into a recognizance by himself alone, before the Judge at *Shrewsbury*, to prosecute the writ of error conformably to the provisions of 16 & 17 *Car.* 2. *c.* 8. for staying execution on bringing writs of error upon judgments in ejectment.

Upon a summons for the Defendant to shew cause at chambers why a writ of execution should not issue, notwithstanding the writ of error, an order of *Gaselee* J. was obtained on the 26th of *August*, after a hearing of both parties, by which order the Defendant was required, within ten days, to become bound to the Plaintiff with two sufficient sureties in the sum of 300*l.* with conditions conformable to the provisions for staying execution in writs of error in ejectment under 16 & 17 *Car.* 2. *c.* 8.; and, in default thereof, it was ordered that a writ of *habere facias possessionem* should issue.

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The Defendant having omitted to become bound with two sureties, pursuant to this latter order, and the Plaintiff having obtained possession under the writ of *habere facias possessionem*,

Wilde Serjt. obtained a rule *nisi*, to set aside the Judge's order, and the writ of *hab. fac. poss.* on the ground that there was nothing in the act 1 *Geo.* 4. *c.* 87. to abridge the Defendant's right to sue out a writ of error upon the old terms imposed by 16 & 17 *Car.* 2. *c.* 8. *s.* 3. namely, upon being bound alone in a reasonable sum, to pay costs and damages in case of nonsuit or discontinuance or affirmance of judgment; and that error was a stay of execution, unless when it was shown to have been fraudulently resorted to for the purpose of delay.

Russell Serjt. shewed cause. The salutary provisions of 1 *Geo.* 4. *c.* 87. will be defeated, if this rule be made absolute; for the object was, to prevent the tenant from improperly holding over, without giving full security to the landlord with two sureties; whereas under the 16 & 17 *Car.* 2. *c.* 8. he is only bound by himself.

By *s.* 3. of 1 *Geo.* 4. *c.* 87. it is enacted that, in all cases in which an undertaking shall have been given and security found, as prescribed by the first section, upon the tenant's appearing to defend, if upon the trial a verdict shall pass for the Plaintiff, but it shall appear to the Judge, before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the Judge to order the execution of the judgment to be stayed absolutely till the 5th day of the term then next following, or till the next session, assizes, or court day (as the case may be); which order the Judge shall in all other cases make upon the requisition of the Defendant, in

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in case he shall forthwith undertake to find, and on condition that within four days from the day of trial he shall actually find security, by the recognizance of himself and two sufficient sureties, in such reasonable sum as the Judge shall direct, conditioned not to commit any waste, or acts in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure, produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given, to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be: provided always, that the recognizances last above-mentioned shall immediately stand discharged, and be of no effect, in case a writ of error shall be brought upon such judgment, and the plaintiff in such writ *shall become bound with two sufficient sureties* unto the Defendant in the same, in such sum and with such condition as may be conformable to the provisions respectively made for staying execution, or bringing writs of error upon judgments in actions of ejectment, by an act passed in *England* in the sixteenth and seventeenth years of the reign of King *Charles* the Second.

Besides, this writ of error is contrary to the Defendant's undertaking to give judgment of a term previous to trial: and where error is brought contrary to good faith, or manifestly for no other purpose than delay, the Court will allow execution to issue, notwithstanding the writ of error: *Cave* v. *Masey* (*a*), *Doe* v. *Roe* (*b*), and the cases referred to in *Tidd*, 1146. 7.

Wilde. An undertaking imposed on a party by act of parliament, as a condition precedent to his defence,

(*a*) 3 *B. & C.* 735. (*b*) 3 *Bingh.* 169.

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is not a contract with respect to which he can be said to violate good faith, if he fail to observe its provisions. But even if it were otherwise, the suing out a writ of error, to which a party is entitled as of right, is no breach of a contract to give judgment of a particular term: the judgment is given, subject to the incidents which attach to it; one of which is liability to be impeached by a writ of error.

The Defendant was entitled to his writ of error, as regulated by 16 & 17 *Car.* 2. *c.* 8.; it is not suggested to have been sued out for the purpose of delay alone; and the two sureties required by the third section of 1 *G.* 4. *c.* 87. are only to be taken where the Defendant sues out a writ of error after requiring at the trial an order from the Judge to stay judgment till the fifth day of the ensuing term, and giving at the same time a recognizance, with two sureties, not to commit waste in the interval; which recognizance is to be discharged, if the Defendant afterwards sues out a writ of error, and becomes bound with two sureties in such sum and with such conditions as are required by 16 & 17 *Car.* 2.

The Defendant here not having required the Judge to stay judgment, was entitled to his writ of error upon the terms of the former statute. After the Defendant has given the securities required by the first section of 1 *G.* 4. *c.* 87., it would be a great hardship to call on him to give additional security on suing out a writ of error.

TINDAL C. J. The question is, whether since the passing of the act 1 *G.* 4. *c.* 87. the Defendant, where the provisions of the first section of that act have been pursued, is authorized to sue out a writ of error, without conforming with the requisitions contained in the third section of the act; and upon the best construction I can put on the act, I think he is not authorized so to proceed. By the

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the first section it is enacted, "That where the term or interest of any tenant, now or hereafter holding under a lease or agreement in writing any lands, tenements, or hereditaments for any term or number of years certain, or from year to year, shall have expired or been determined, either by the landlord or tenant, by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand made in writing, and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant or person, requiring him to appear in the court in which the action shall have been commenced on the first day of the term then next following, or, if the action shall be brought in *Wales*, or in the counties palatine of *Chester*, *Lancaster*, or *Durham*, respectively, then on the first day of the next session or assizes, or at the court day, or other usual period for appearance to process then next following (as the case may be), there to be made defendant, and to find such bail, if ordered by the Court, and for such purposes as are hereinafter next specified; and upon appearance of the party at the day prescribed, or, in case of non-appearance, on making the usual affidavit of service of the declaration and notice, it shall be lawful for the landlord producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded

manded in manner aforesaid, to move the Court for a rule for such tenant or person to shew cause, within a time to be fixed by the Court on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, besides entering into the common rule, and giving the common undertaking, should not undertake, in case a verdict should pass for the plaintiff, to give the plaintiff a judgment to be entered up against the real defendant, of the term next preceding the time of trial, or if the action shall be brought in *Wales*, or in the counties palatine, respectively, then of the session, assizes, or court day (as the case may be) at which the trial shall be had, and also why he should not enter into recognizance, by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff; and it shall be lawful for the Court, upon cause shewn, or upon affidavit of the service of the rule in case no cause shall be shewn, to make the same absolute in the whole or in part, and to order such tenant or person within a time to be fixed, upon a consideration of all the circumstances, to give such undertakings and find such bail, with such conditions, and in such manner, as shall be specified in the said rule, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court to enlarge the time for obeying the same, then, upon affidavit of the service of such order, an absolute rule shall be made for entering up judgment for the plaintiff."

It is to be observed that the Defendant is not bound to give this undertaking at all events, but he may shew cause against the rule calling on him to give it, and even in case no cause be shewn, the court is to make the rule absolute in the whole or in part, upon a consider-

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ation of all the circumstances. However, after the Defendant has entered into the undertaking, he is not in the condition of an ordinary Defendant, but is to give judgment as of the term preceding the trial; and if he was clogged with the common undertaking before this statute, it can scarcely be contended that he may elude the additional undertaking now required at his hands. The course to be pursued, however, seems clearly pointed out in the third section. According to that section, execution can only be stayed in two modes: one, by order of the Judge spontaneously issued where he thinks the verdict contrary to evidence, or the damages excessive; the other by order of the Judge, issued upon the requisition of the Defendant, upon his entering into a recognizance with two sureties not to commit waste. If he brings a writ of error, he is to be bound with two sufficient sureties in such sum and with such conditions as are conformable to the statute of 16 & 17 *Car.* 2. *c.* 8., and the recognizance against committing waste is to be of no effect. It seems, therefore, that where a verdict is given for the plaintiff, the legislature intended a stay of execution should rest, not on the ordinary ground, but only on the conditions imposed by the third section of the statute. The rule must be discharged.

GASELEE J. The order was granted in mercy to the Defendant, because, no application having been made within four days after the trial, the lessor of the Plaintiff was entitled to immediate execution; and I remain of the same opinion as when I issued the order. The object of the act was to enable landlords more speedily to recover possession of their lands, not generally, but in particular cases, where the tenant holds over after his term has expired or a regular notice to quit has been given. In such cases the act gives the landlord judgment as of the term preceding the trial of his ejectment; and

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and it was intended by the legislature that execution should be stayed only in the two cases specified in the third section, namely, where the Judge thinks the verdict contrary to evidence, or the damages excessive, or where the Defendant within four days has given a recognizance with two sureties not to commit waste. If the Defendant could stay execution by suing out a writ of error without finding two sureties, the provision for a recognizance against the commission of waste would be altogether nugatory.

BOSANQUET J. I am of the same opinion. The question turns on the construction to be put on the undertaking required by the first section of 1 *G.* 4. *c.* 87. That act applies to cases of landlord and tenant, only where the tenant occupies under a written agreement, and holds over after his term has expired, or the termination of a regular notice to quit. Those facts are to be made out by affidavit, and then a rule *nisi* only is granted, against which the tenant has his opportunity of shewing cause. If the rule be made absolute, he enters into the undertaking required by the statute. That undertaking has been given in this case; the effect of it is to give an available judgment of the preceding term, that is, such a judgment as will enable the Plaintiff to proceed to execution: the undertaking will not deprive the Defendant of his writ of error, but he can have a stay of execution only in the two cases pointed out by the third section, viz. where the Judge thinks the verdict contrary to evidence, or the damages excessive, or where the Defendant has given the recognizance with two sureties required by the statute to prevent the commission of waste. If the Defendant could elude this provision by suing out a writ of error, and entering into a recognizance on his own security alone, the intention of the legislature to give the landlord possession, or ampler

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security than that of the tenant himself, would be altogether defeated.

ALDERSON J. I am of the same opinion. This being an action of ejectment, the Defendant enters into the common undertaking. The statute 1 *G.* 4. *c.* 87. requires a further undertaking, to give a judgment as of the term preceding the trial, if the verdict pass for the Plaintiff; and the statute would be rendered unavailing, if this undertaking could be defeated by the Defendant's bringing a writ of error on his own security alone; for he is only entitled to a writ of error subject to the restrictions imposed on him by the third section of the act, that is, upon entering into a recognizance with two sureties, according to the conditions imposed by 16 & 17 *Car.* 2. *c.* 8. As to the alleged hardship of requiring such a recognizance from him a second time, see who the parties are, and how they stand with respect to each other. The act is confined to cases of landlord and tenant where the tenant holds over on the expiration of his term or of a regular notice to quit. Before the Defendant is called on to give the undertaking and enter into the first recognizance, the expiration of the lease or notice must be shewn to the Court by affidavit; and the Defendant has the opportunity of urging any objection which can avail him. He is then only required to give a judgment of the term preceding the trial, in case the verdict should pass against him, to the satisfaction of the Judge. The tenant, therefore, is sufficiently protected, if after that he be not prevented from staying execution except on terms which no honest man would refuse, namely, by entering into a recognizance with two sureties not to commit waste; a recognizance which he may discharge on giving another with two sureties, in case he proceed to a writ of error. If he were not compelled

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to find those sureties on suing out his writ of error, and could stay execution on his own security alone, the statute 1 *G.* 4. *c.* 87. would be entirely defeated.

Rule discharged.

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Nov. 20.

REPLEVIN for taking cattle.

Cognizance, that the freehold of the *locus in quo* was in the bailiff, assistants, and commonalty of *Godmanchester*, otherwise *Gumcester*, and because Plaintiff's cattle was there damage feasant, Defendant, as servant of the bailiff, assistants, and commonalty, took them.

The plaintiff pleaded twelve pleas, on the first eight of which were issues to the country.

In the eighth plea the Plaintiff, among other matters, alleged, that on the 1st *July* 1802, by a certain act of parliament made and passed in the forty-third year of the reign of *George* the Third, entitled An Act for dividing and enclosing certain open and common fields, meadows, lands, commons, and commonable places within the parish of *Gumcester*, otherwise *Godmanchester*, in the county of *Huntingdon*; after reciting that there were within the parish of *Gumcester*, otherwise *Godmanchester*, in the county of *Huntingdon*, certain open and common fields, meadows, lands, commons, and commonable places, containing by estimation 4600 acres or thereabouts; and also reciting that the bailiff, assistants, and commonalty of *Gumcester*, otherwise *Godmanchester*, aforesaid, were lords of the manor of *Gumcester*, otherwise *Godmanchester*, and as such did claim to be entitled to the right of the soil within the said manor; commissioners and a

Plaintiff pleaded a right of common under an award of commissioners appointed by an enclosure act, which authorised them to award such rights in respect of certain messuages in *G.*, and gave an appeal in three months after the award, by feigned issue and to the quarter sessions:

Held, that, the limited time having elapsed, it was not necessary for him to shew the original right in respect of which the commissioners had given him the right in the award.

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surveyor were appointed for valuing, allotting, and setting out, &c. the common fields and commonable places, &c.; and it was among other things enacted, that if any dispute or difference should arise between any of the parties interested, or claiming to be interested, in the said division and enclosure, touching or concerning the right to the soil of the said commons and waste grounds, or any part or parts thereof, or touching or concerning the respective rights and interests which they or any of them should have, or claim to have, in the same, or touching or concerning any other matter or thing relating to the said divisions and allotments, it should and might be lawful for the said commissioners, and they were thereby authorised and required with all convenient speed, to proceed to hear and determine such claims and objections:

And it was further enacted, that the said commissioners should, and they were thereby required to set out, allot, and award unto and for the said bailiff, assistants, and commonalty, and their successors, as lords of the manor of *Godmanchester* aforesaid, such part of the said lands and grounds within the said parish of *Godmanchester* thereby intended to be divided and enclosed, as in the judgment of the said commissioners should be equal to one-twentieth part of the waste or known common lands within the parish of *Godmanchester* aforesaid, for the use and in lieu of, and as a full compensation and satisfaction for all the rights and interests of the said bailiff, assistants, and commonalty, as lords of the said manor, in and to the soil of all the waste or known common lands within the said parish of *Godmanchester*:

And it was provided and enacted, that in case it should appear to the said commissioners that it would be more advantageous to fence the whole or any part of the said meadows, rather than permit the same to remain

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remain unenclosed, it should be lawful for the said commissioners to enclose the whole, or such part or parts thereof as they should think proper, in such and the same manner as other lands were directed to be enclosed by the said act; but for the full enjoyment of such part of the said meadows which should be left unenclosed, the said commissioners should and might, and they were thereby authorised and empowered by their award to stint, ascertain, and express what number and sorts of cattle each of the proprietors of commonable messuages and lands in the said meadows should be at liberty at seasonable times to feed and depasture thereon, and also to ascertain the time or times when such feeding and depasturing should begin and end; and the same meadows from thenceforth should be fed and depastured only by such number and sorts of cattle and at such time or times as in the award to be made by the commissioners should for that purpose be expressed:

And it was further provided and enacted, that the said commissioners should set out, allot, and award, as and for a common pasture, to be used, stocked, and enjoyed as thereinafter mentioned, out of and from certain commons in *Godmanchester* aforesaid, called the *East* and *West Commons*, such plot or plots of land or ground as should in the judgment of the said commissioners be a full equivalent satisfaction and compensation for the rights of common of all the owners and proprietors of commonable messuages or cottages, for such messuages or cottages only, as well on the said commons as on the said meadows and common fields within the said parish of *Godmanchester*, which said plot or plots of land should be held, used, stocked, and enjoyed by such owners or proprietors, and their respective tenants and occupiers of the said messuages and cottages, only as a common pasture, in such manner as the said commissioners should in and by their award direct and appoint: And it was further enacted, that all tofts, foundations, or

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sites of ancient commonable messuages or cottages should, upon proof thereof being made to the satisfaction of the said commissioners, be considered and deemed as commonable messuages or cottages respectively, and that the respective owners thereof should be entitled to the same compensation for the respective rights of common originally belonging thereto as if such messuages or cottages had been still standing:

And it was further provided and enacted, that in case any person or persons interested in the said then intended division and allotment should be dissatisfied with any determination of the said commissioners touching or concerning any claim or claims, or other rights or interests in, over, or upon the lands and grounds thereby directed to be divided, allotted, and enclosed, or any part thereof, it should be lawful for the person or persons so dissatisfied to proceed to a trial at law of the matter so determined by the said commissioners at the then next, or at the following assizes to be holden for the said county of *Huntingdon*, and for that purpose, the person or persons who should be dissatisfied with the determination of the said commissioners should, upon giving notice to the said commissioners of his, her, or their intention to bring such action within one month after such determination should be made, cause an action to be brought upon a feigned issue against the person or persons in whose favour such determination should have been made, within three calendar months next after the determination of the said commissioners should be so made. And it was provided, that the determination of the said commissioners touching such claim or claims of right to the soil of the said commons and waste grounds, or other rights or interests in, over, or upon the lands and grounds thereby directed to be divided, allotted, and enclosed, or any part thereof, which should not be objected to, or, being objected to, the party or parties objecting

objecting should not cause such action at law to be brought and proceeded in as aforesaid, should be final and conclusive upon all parties: provided that nothing in the said act contained should authorise the said commissioners to determine the title to any messuages, cottages, lands, tenements, or hereditaments whatsoever:

And it was further enacted, that the award to be made by the said commissioners, when enrolled in the manner directed by the said recited act, should be deposited in the parish church of *Godmanchester* aforesaid; and that all notices required to be given by the said commissioners relating thereto and to the public carriage roads should be inserted in the *Cambridge Chronicle:*

And it was enacted, that if any person or persons should think himself, herself, or themselves aggrieved by any thing done in pursuance of that act, other than and except such orders and determinations of the said commissioners as were therein directed to be final or conclusive, and except in such cases where an issue at law should be tried as thereinbefore mentioned, then, and in every such case, he, she, or they might appeal to the general quarter sessions of the peace which should be holden for the county of *Huntingdon*, within six calendar months next after the cause of complaint should have arisen, on giving to the said commissioners, and to the party or parties concerned, eight days' notice in writing of such appeal, and of the matter thereof; and the justices not interested in the premises in their said general quarter sessions were thereby required to hear and determine the matter of every such appeal, and to make such order and award, and such costs and damages, as to them in their discretion should deem reasonable.

The plea then tendered an issue to the country, on which issue was joined.

The Plaintiff pleaded, ninthly, That before and at the time when, &c. he had been and still was seised in

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in his demesne as of fee, of and in a certain messuage (being one of the commonable messuages mentioned in the said act of parliament in the eighth plea before mentioned), with the appurtenances, situated and being in the parish aforesaid, in the county aforesaid; and that long before and at the time of the making and executing the award thereinafter mentioned, the owner and proprietor thereof for the time being had a certain right of common of pasture in, upon, and throughout a certain common, situate and being within the said parish of *Gumcester*, otherwise *Godmanchester*, in the county aforesaid, called the *West Common*, mentioned in the act of parliament in the eighth plea mentioned, and therein called the *West Common*: that the said commissioners in the said eighth plea mentioned, having taken upon themselves the burden of the execution of the powers vested in them by the said act in the eighth plea mentioned, in pursuance of the said act, and before the said time when, &c. under their respective hands and seals, to wit, on the 23d day of *June* 1809, to wit, at, &c. did make their award in writing, of and concerning the said division and enclosure mentioned in the said act; which said award, fairly written on parchment, was then and there read and executed by the said commissioners in the presence of the proprietors of the lands mentioned in the said act, who did attend at a special general meeting called and held for that purpose, of which ten days' notice had been given in the *Cambridge Chronicle*, being a paper for that purpose mentioned in the said act, and circulated in the said county of *Huntingdon*, and which execution of the said award was duly proclaimed the then next *Sunday*, in the parish church of *Gumcester*, otherwise *Godmanchester*, being the parish in which the said last-mentioned lands did lie; by which award the said commissioners did (amongst other things) set out, allot, and award as a common

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common pasture to be used, stocked, and enjoyed by the owners and proprietors of commonable messuages or cottages and the respective tenants and occupiers of the said messuages and cottages only, having right of common upon the said common in *Gumcester*, otherwise *Godmanchester* aforesaid, known by the name of the *West Common*, the plot of land or ground therein mentioned, that is to say, "*West Common* allotment," unto and for the owners and occupiers of commonable messuages or cottages, and toftsteads, and the respective tenants or occupiers of the said messuages and cottages, and toftsteads, having right of common upon the *West Common* in *Godmanchester* aforesaid, one plot of land or ground, &c. And the said commissioners did award, order, and direct that no stock of any kind should be turned on the said *West Common* by any person or persons whomsoever after the 14th day of *February* until the 13th day of *May*, in every year, and that on the 13th day of *May* until the 23d day of *November*, in every year, every owner or occupier of any commonable messuage or cottage, or toftstead, being the site of an ancient commonable messuage or cottage within the said parish, according to the list contained in the schedule thereunto annexed, might stock upon the said *West Common* two cows for every such messuage, cottage, or toftstead, and that on the 23d day of *November*, in every year, until the 14th day of *February* following, every owner or occupier might stock four sheep for every such messuage, or cottage, or toftstead, and that every owner or occupier of any messuage, cottage, or toftstead, having a right of common upon the said *West Common*, keeping only one mare or gelding to enable him to follow any trade or occupation, who should be desirous of turning such mare or gelding on the said *West Common*, instead of two cows in manner before mentioned, should be at liberty so to do, provided no foal should

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should be put in with any such mare: as by the said award, reference being thereunto had, will amongst other things more fully and at large appear: and the Plaintiff said, that the said plot of land or ground last thereinbefore mentioned and described, being the place in which, &c. was part of the said common mentioned in the said act of parliament in the said eighth plea mentioned, and therein called the *West Common*; and that the said messuage of him the said Plaintiff, mentioned in that plea, was inserted, specified, and mentioned by the said last-mentioned commissioners in the list contained in the schedule annexed to the said award as one of the messuages in respect of which the owner or occupier thereof might use, stock, and enjoy the said plot of land or ground thereinbefore mentioned and described, being the place in which, &c. as a common of pasture in the manner by the said last-mentioned commissioners in and by their said award directed and appointed: by virtue of which said act, and of which said award, the Plaintiff being so seised of the said last-mentioned messuage as aforesaid at the said time when, &c. had, and still of right ought to have, a right of common of pasture in and over the said place in which, &c., that is to say, a right to stock the same place in which, &c. with two cows on the 13th day of *May* until the 23d day of *November* in every year, at his free will and pleasure, as to his said last-mentioned messuage with the appurtenances belonging; and being so seised of the said last-mentioned messuage, with the appurtenances, he afterwards and before the time when, &c. to wit, on the day and year in the said declaration mentioned, being between the 13th day of *May* and the 23d day of *November* in the year last aforesaid, turned and put the said two cows, being his own cattle, and the said cattle in the said declaration mentioned, into the said place in which, &c. to feed and depasture on the

the grass there then growing, and to use the said common of pasture of the said Plaintiff there, as he lawfully might; and the said cattle remained there feeding and depasturing on the grass there then growing, and using the said common of pasture, until the said Defendant of his own wrong, at the said time, when, &c. took the said cattle in the said place in which, &c. and unjustly detained the same against sureties and pledges, until, &c.

The tenth plea was in substance the same as the ninth, but more concise.

The eleventh alleged that a right of common on the *locus in quo* was awarded to the Plaintiff, as occupier of a commonable messuage, without alleging any right of common previous to the passing of the enclosure act.

The twelfth was the same as the ninth and tenth, but alleged the right of common before the enclosure act to have been in owners of commonable messuages being freemen of *Godmanchester*.

The Defendant demurred to the ninth, tenth, and eleventh pleas, setting out as grounds of demurrer, that, in order to justify a trespass upon the soil and freehold of another, the Plaintiff should have distinctly set forth in the pleadings the nature, extent, terms, and mode of enjoyment of the rights of common claimed, so that issues might have been taken thereon; also, that the commissioners under a private act of parliament could not give a right of common over the soil and freehold of a stranger to the act who takes no benefit under it.

To the twelfth he replied, that the Plaintiff was not a freeman of *Godmanchester*:

Which replication the Plaintiff demurred to, as tendering an immaterial issue.

Wilde Serjt. in support of the demurrer to the replication. The replication tenders an immaterial issue, and the

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the pleas are good. It was not necessary for the Plaintiff to set out in those pleas the original right in respect of which the commissioners awarded rights of common to him. The commissioners had authority to enquire into and determine whether he had a previous right; a power of appeal within a limited time was given against their decision, by way of feigned issue, and that appeal not having been made, the award of the commissioners is final and conclusive. It would be most mischievous if it could now be questioned after a lapse of twenty-one years. Parties relying on the substituted right may have lost all trace and evidence of their original right; and it is impossible for the corporation of *Godmanchester* to contend that they are not bound by the award, or that they come within any saving clause of the act, when the act recites that they are lords of the manor, proposes to deal with the waste lands, and prescribes an allotment to be made to them in lieu of their manorial rights. In *Riddell* v. *White* (*a*), where an enclosure act directed part of a waste to be sold *tithe free*, to defray the expences of the enclosure; the rector was not otherwise a party; and the saving clause was of all claims except of the lord and of the commoners; yet the rector's right to the tithes of the waste sold tithe free was decided to be gone; and it was held, that these enclosure bills were not to be considered as merely private acts.

Merewether Serjt. *contra*. The plaintiff must establish a good title *in omnibus*. *Hawkins* v. *Eckles*. (*b*) He ought, therefore, to have alleged that he was, as a freeman of *Godmanchester*, entitled to make a claim at the hands of the commissioners; for it does not appear that they had authority to determine who were and who were not freemen. The award is not conclusive on that point,

(*a*) 1 *Anstr.* 281. (*b*) 2 *B.* & *P.* 359.

and

and the powers of the commissioners must be construed strictly. In *R.* v. *Washbrook* (*a*), where, by a private enclosure act, commissioners were directed to fix and settle the boundaries of a parish in a certain manner therein specified, to advertise in a provincial newspaper a description of the boundaries so fixed and settled, and the boundaries, so fixed and settled, were also to be inserted in the award of the commissioners, and to be final, binding, and conclusive; the commissioners having fixed and settled the boundaries in the mode specified, and having duly advertised a description of them, but the boundaries mentioned in the award having varied from those which had been advertised; it was held, that the commissioners had not pursued the authority given by that act, and that their award was not binding as to the boundaries of the parish. And in *R.* v. *Hasling field* (*b*) upon an indictment against the parish of *H.* for not repairing a highway, an award made by commissioners under an enclosure act, which awarded the highway to be in a different parish, was holden not to be admissible evidence for the Defendants, without showing that the commissioners had given the previous notices required by the act before they ascertained the boundaries; it appearing that the usage had not been pursuant to the award, the Defendants having since the award, as well as before, repaired the highway. *White* v. *Riddell* turned altogether on the language of the particular act there in question. The effect of this act of parliament and award was to give a compensation for rights of common in the freemen of *Godmanchester*, leaving their title untouched, and subject to the same modes of proof as before. The award itself alleges the right to be in the freemen, and it was incumbent therefore on the Plaintiff to allege that he was a freeman. Arguments

(*a*) 4 *B.* & *C.* 732. (*b*) 2 *M.* & *S.* 558.

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ab inconvenienti against the act are proper only in the legislature, and not in a court of law. The corporation of *Godmanchester* are neither parties nor privies to the act; they are not bound by a mere recital; and it is not even averred in the pleas that they are the corporation described in that recital: at all events, therefore, their claims come within the operation of the saving clause. [*Tindal* C. J. This is a private act, and the saving clause should have been pleaded.] The Plaintiff should have shewn that they took some benefit under the act, if he proposes that they should be bound by it. There can be no presumption that the proceedings of commissioners under a private act have been regular; they must be shewn to have been so. Even where a road has been stopped by magistrates acting in a public capacity, it may be opened, if it turn out that the stoppage were not according to law.

Wilde, in reply, contended that the corporation might be considered in the light of parties and privies to this act, since they were not only named in the recital, but an allotment was directed to be given to them in respect of their manorial rights. As to the alleged necessity for an averment that the employers of the Defendant were the corporation in question, it could not be intended that there were two corporations bearing the same name, and possessing manors in the same place.

TINDAL C. J. The question in this cause arises on the ninth, tenth, and eleventh pleas in bar, and on the replication to the twelfth plea. But it is sufficient to state our opinion on the three pleas in question, because the decision on the replication falls within the same principle. The objection to the pleas is, that they do not state the right, in lieu of which the commissioners gave the Plaintiff the substituted right; and that the corporation of *Godmanchester*, not being privy to the private act,

act, are not bound by its provisions. However, they are not only privy, but parties to the act as set out on record. It recites, that there were within the parish of *Gumcester*, otherwise *Godmanchester*, in the county of *Huntingdon*, certain open and common fields, meadows, lands, commons, and commonable places, containing by estimation 4600 acres, or thereabouts: that the bailiff, assistants, and commonalty of *Gumcester*, otherwise *Godmanchester*, aforesaid, were lords of the manor of *Godmanchester*, and as such did claim to be entitled to the right of the soil within the said manor; and, after appointing commissioners, enacts, that the said commissioners should, and they were thereby required to set out, allot, and award unto and for the said bailiff, assistants, and commonalty, and their successors, as lords of the manor of *Godmanchester* aforesaid, such parts of the said lands and grounds within the said parish of *Godmanchester* thereby intended to be divided and inclosed, as in the judgment of the said commissioners should be equal to one-twentieth part of the waste or known common lands within the parish of *Godmanchester* aforesaid, for the use and in lieu of, and as a full compensation and satisfaction for all the rights and interests of the said bailiffs, assistants, and commonalty, as lords of the said manor, in and to the soil of all the waste or known common lands within the said parish of *Godmanchester*.

The parties in whose right the distress has been taken are the bailiff, assistants, and commonalty of *Godmanchester*, and the distress is for cattle depasturing on *West Common*. It might have been more expressly alleged, that the parties in whose right the distress has been taken, are the same body as that described in the act of parliament. But we must either presume this to be the case, or intend that there are in the same place two cor-

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porate bodies bearing precisely the same name, and claiming the same property.

If the corporation are not only privy but parties to the act, the whole question arises on its construction. And we are of opinion that the original right of common, for which a new right has been substituted by the act, was not intended to be traversable, except in the way prescribed by the act. It would occasion extreme inconvenience if we were to hold otherwise, and enable parties to put off the time of disputing claims till all evidence in support of them has probably been lost. But if we examine the provisions of the act with respect to the powers of the commissioners, we find that they have power to determine on the validity of claims, a power which would be useless unless it were in some way to be final. "If any dispute or disputes, or difference, should arise between any of the parties interested, or claiming to be interested, in the said division and enclosure, touching or concerning the right to the soil of the said commons and waste grounds, or any part or parts thereof, or touching or concerning the respective rights and interests which they or any of them should have or claim to have in the same, or touching or concerning any other matter or thing relating to the said divisions and allotments, it should and might be lawful for the said commissioners, and they were thereby authorised and required with all convenient speed to proceed to hear and determine such claims and objections."

The act then gives a power of questioning their decision in a feigned issue, and an appeal to the sessions within a limited time, and provides, "That the determination of the said commissioners touching such claim or claims of right to the soil of the said commons and waste grounds, or other rights or interest in, over, or upon the lands and grounds thereby directed to be divided,

divided, allotted, and enclosed, or any part thereof, which should not be objected to, or being objected to, the party or parties objecting should not cause such action at law to be brought and proceeded in as aforesaid, should be final and conclusive upon all parties."

Inasmuch, therefore, as the Plaintiff's right was capable of being litigated at the time of making the award, and was never then contested, how are we to say that the award was not final? Should we do so, none would ever be safe who took rights under that award. Seeing, therefore, that the commissioners have declared the Plaintiff possessed of a right, in place of which they have given him the new right on which he now relies, we esteem their award final and conclusive. They have determined that he was a freeman of *Godmanchester*, for that was the ground of the original right, in lieu of which they have awarded the substituted right. That question, therefore, cannot now be put in issue.

GASELEE J. I am of the same opinion. It is sufficient if any one plea be free from objection, and the eleventh seems to contain all that is requisite to the Plaintiff's claim. What is required by the act? "If any dispute or difference should arise between any of the parties interested, or claiming to be interested in the said division and enclosure, touching or concerning the right to the soil of the said commons and waste grounds, or any part or parts thereof, or touching or concerning the respective rights and interests which they or any of them should have or claim to have in the same, or touching or concerning any other matters or thing relating to the said divisions and allotments, it should and might be lawful for the said commissioners, and they were thereby authorised and required with all convenient speed to proceed to hear and determine such claims and objections."

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The plea does not allege any antecedent right, but refers to the award, and the act mentioned in the eighth plea. It then avers, that the Plaintiff was seised of a messuage, and entitled to turn out cattle. Enough is stated to assert his right and to establish a decisive answer to the cognizance. We must presume that the bailiff, assistants, and commonalty of *Godmanchester* mentioned in the plea are the same parties as those described in the act; for the Court cannot intend that there are two corporations in the same place with the same name and the same estate.

BOSANQUET J. I am of the same opinion. There are two questions to be determined. First, whether the Plaintiff is bound to set out the right he possessed previously to the award; secondly, whether the corporation of *Godmanchester* is bound by the act; and the Plaintiff is entitled to the judgment of the Court on both points. It is not denied that the Plaintiff is possessed of the messuage in respect of which he claims a right of common under the award; he must therefore have been a party within the jurisdiction of the commissioners, and it is immaterial now, what his right was previously to the award. The award is now the source of his title, and it is declared to be conclusive, subject to a mode of appeal, by the trial of a feigned issue within a certain period. No such issue was resorted to, and it is not competent to the Defendants to question now what was the right of common in respect of which the Plaintiff obtained the award. Then, the traverse on the twelfth plea is immaterial. It is competent to the legislature to bind any party by an act of parliament, if the intention be clear. In a common estate bill there is not, in general, any intention to bind third parties; but when the corporation is described in this bill as the owner of the soil which it is the object of the act to distribute, it would

would be difficult to suppose that the legislature did not intend to bind the rights of the corporation as well as those of the other parties interested.

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ALDERSON J. I am of the same opinion. These enclosure acts are local laws, binding all who take an interest under them.

Judgment for the Plaintiff.

DAVIES Demandant, DAWSON Tenant, EVANS Vouchee.

Nov. 22.

THE acknowledgment was taken in *November* 1830, by a person who had acted as an attorney of the great sessions in *Wales*, and who by 1 *W.* 4. *c.* 70. *s.* 16. was, as such attorney of the great sessions, authorised to practise in all actions in the courts at *Westminster*, where the party resides in the principality of *Wales*.

An attorney of the great sessions in *Wales* is competent to take an acknowledgment on which a recovery may pass.

The tenant resided in *London*. The rule of this court requires that the commissioner to take the acknowledgment shall be an officer of one of the four courts of *Westminster Hall*.

Jones Serjt. moved that the recovery might pass, on the ground that, by the stat. 1 *W.* 4., an attorney of the great sessions was placed on the same footing as an attorney of the courts at *Westminster*.

TINDAL C. J. The statute does not apply here, for the tenant does not reside within the principality of *Wales*. The rule of court, however, applies only to recoveries in *England*. Acknowledgments out of *England* have constantly been taken by persons who have not been officers of the four courts. The recovery, therefore, may pass.

Fiat.

1830.

Nov. 23. **In the Matter of NAISH, Executrix of STEWART.**

An annuity for four lives, with a covenant that the grantor should insure the principal sum within thirty days after the expiration of the third life, is not an usurious contract.

IN the year 1805, *James Stewart* and *John Cressett Pelham*, in consideration of 1000*l.* paid to *Stewart*, granted an annuity of 120*l.* to *John Holland* for the term of the joint natural lives of *John Holland*, *Mary* his wife, *Mary Ann Holland*, and *Lucy Dalrymple*, and the lives and life of the survivors and survivor of the longest liver of them.

And *Stewart* and *Pelham* for themselves, their heirs, executors, and administrators, covenanted with *Holland*, his executors, administrators, and assigns within thirty days next after the decease of such three of them, the said *John Holland*, *Mary* his wife, *Mary Ann Holland*, and *Lucy Dalrymple*, who should first depart this life, to insure in some respectable office of insurance in *London* for the use of the said *John Holland*, his executors, administrators, and assigns, the sum of 1000*l.* to be paid on the decease of the survivor of them the aforesaid nominees, and, upon the completion of such insurance, to make such assignment of the policy or policies thereof unto the said *John Holland*, his executors, administrators, and assigns as should be requisite to make over the same and all benefit thereof to him, and for his and their sole use.

The grantors executed also a warrant of attorney to enter up judgment for 2000*l.*, but no judgment was ever entered up.

This annuity passed through several mesne assignments to *Edward Gregory* and *Robert Johnston*, who purchased the same of the sheriff under a writ of *venditioni exponas*.

In the course of this term

Taddy Serjt. obtained, on the part of *Stewart's* executrix, a rule *nisi* to set aside the warrant of attorney, on the ground that the same was void for usury.

Wilde

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Wilde Serjt. shewed cause. There is no affidavit alleging this to be a colourable transaction, or other than a *bonâ fide* annuity. It was no loan; and, therefore, there could be no usury. The principal was clearly in hazard. If the two last lives had dropped at once; or the last life had dropped within the thirty days, and before the insurance had been effected, the covenant would have been of no avail. So, if the policy had happened to be avoided under any of the numerous stipulations on the part of the office. This is a common mode of effecting grants of annuity; *Cummins* v. *Isaac* (*a*), *Morris* v. *Jones* (*b*); and the Court will not presume a colourable transaction, where there is nothing out of the usual course.

The Court called on

Taddy to support his rule. He contended this was a loan, for the covenant to insure was equivalent to a covenant for repayment. If the last life dropped during the thirty days, no insurance could have been effected. The covenant, therefore, meant that an insurance should be effected within the thirty days, *and* during the life of the survivor. The grantee, therefore, was in a better position than he would have been, if he had only taken a covenant for the repayment of the money, which would have been clearly usurious; for here he had not only the chance of the policy, but if the grantor omitted to effect it, an action against the grantor on the covenant to insure, by which he would recover the sum originally advanced. Even if the two last lives had dropped at the same moment, the act of God would not excuse the grantor from his absolute covenant. He could have pleaded no plea but performance.

TINDAL C. J. The question is, whether an advance of money under the circumstances now laid before the

(*a*) 8 *T. R.* 183. (*b*) 2 *B. & C.* 232.

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Court comes within the statute of *Anne*, as a loan of money on which a larger rate of interest than five *per cent.* has been reserved. The general rule is, that there is no loan where the principal is placed in hazard, because a loan contemplates repayment of the money lent; and where there is no loan it is a matter of agreement between the parties on what terms the money shall be advanced. In the present case the hazard was considerable: suppose the third and fourth lives had dropped together, how could it be said that there was any breach of covenant in not insuring at the expiration of the third, if it could not be ascertained which perished first. But suppose the insurance had been effected, there are often clauses in policies which induce considerable hazard; as if the life insured were determined by suicide. Upon such a precarious mode of repayment we cannot say the parties intended a loan. The Court is satisfied, on the ground that there is no affidavit imputing to the parties the intention of a loan, or shewing that the principal has never been put in hazard.

GASELEE J. concurred.

BOSANQUET J. I do not think this covenant is such a stipulation as constitutes the transaction a loan.

ALDERSON J. *Grigg* v. *Stoker* (*a*) is not distinguishable from the present case. There, an agreement to pay 12*l.* per cent. on the amount of the purchase-money of a vessel, was held not usurious, though there was a covenant to keep the vessel insured.

Rule discharged with costs.

(*a*) *Forrest*, 4.

1830.

BAYLISS *v.* FISHER.

Nov. 23.

CASE for a wrongful distress.

The Defendant seized the goods, made out an inventory for the Plaintiff, placed a man to keep possession from the end of *May* to the middle of *June*, and then gave them up to the Plaintiff. In the mean time, the Plaintiff had the free use of the goods; and a cart, which formed part of them, was driven to market every day.

A verdict having been found for the Plaintiff, with 15*l.* damages,

The Defendant wrongfully seized goods, and placed a man in possession of them for some days: Held, the owner might recover damages, although he had the use of the goods all the time.

Wilde Serjt. moved to set aside the verdict, on the ground, that in an action for a tort, not arising out of a breach of contract, the Plaintiff must shew some damage in order to entitle himself to a verdict.

Andrews Serjt. shewed cause; but after hearing

Wilde in support of his rule,

The Court was clearly of opinion, that the seizure of the goods, and the placing a man to keep possession of them, without whose permission the Plaintiff could not have used them, and whose permission might have been withdrawn, altogether constituted an injury, for which the Plaintiff was entitled to damages, and the amount being under 20*l.*, they refused to grant a new trial.

Rule discharged.

1830.

Nov. 25.

DAVIS and Others, Assignees of WHITE, a Bankrupt, *v.* EYTON.

A lease having been granted on condition that if the lessee contracted a debt on which he should be sued to judgment which should be followed by execution, the lessor should re-enter as of his former estate, and the lessor having re-entered after a judgment and execution, Held, he was entitled to the emblements.

TRESPASS for taking goods.

The Defendant had let a farm to *White* under a condition, "That if the lessee should commit an act of bankruptcy, whereon a commission should issue, and he should be declared bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fieri facias*, or any other writ of execution should issue, it should and might be lawful for the lessor to reenter into the demised premises, and the same again to have, repossess, and enjoy, as in his former estate."

On the 28th of *March* 1829, judgment was signed against *White* by one *Lowndes*, for a debt of 1034*l.*

A *fi. fa.* issued thereupon, under which *White*'s stock was sold on the 18th of *April*.

On the 11th of *May* the Defendant re-entered for the forfeiture, took possession of the growing crops, and afterwards harvested and sold them.

On the 19th of *May* a commission of bankrupt issued *White*, under which he was declared a bankrupt, and the Plaintiffs, his assignees, sought by this action to recover the value of the growing crops taken by the Defendant on his re-entry, as well as certain hay and straw of *White*'s, remaining on the premises at the time of the re-entry.

The value of the crops was 442*l.* 19*s.* 6*d.* The value of the hay and straw 30*l.*

A verdict was given for the Plaintiffs at the last assizes for the county of *Salop*, for 472*l.* 19*s.* 6*d.*, with leave

leave for the Defendant to move to reduce the damages to 30*l.*, the value of the hay and straw alone.

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Russell Serjt. obtained a rule *nisi* for that purpose, on the ground that the lease having been determined by the lessee's own act, the landlord, on re-entry for the forfeiture, was entitled to the emblements. (*a*) "Where the estate of the lessee, being uncertain, is determined by a right paramount, or if the lease determine by the act of the lessee, as by forfeiture, condition, &c., then he that hath the right paramount, or that entereth for the forfeiture, shall have the corn;" as if a feme copyholder *durante viduitate*, sows land, and before severance of the corn takes husband, the lord shall have the corn, and not the husband. *Oland* v. *Hardwicke* (*b*), *Oland's* case (*c*), *Wickes* v. *Jordan.* (*d*) And in *Bulwer* v. *Bulwer* (*e*), *Abbott* C. J. says, "The general rule of law is, that when a tenant of land has an uncertain interest, which is determined either by the act of God or the act of another, then he shall have the emblements; but that is not so where the tenancy is determined by his own act."

Wilde Serjt. shewed cause. The estate of *White* was not determined by his own act, but by act of law; or, at all events, partly by act of law. The estate was not to be determined by an act of bankruptcy, or a debt; but by an act of bankruptcy, followed by a commission; or a debt followed by judgment and execution. A tenant under such a condition, would be led to cultivate after committing an act of bankruptcy or contracting a debt, because it would never be certain that such an act would be followed by a commission, or such a debt by a judg-

(*a*) *Co. Lit.* 55. *b.*
(*b*) *Cro. Eliz.* 461.
(*c*) 5 *Rep.* 116 *a.*
(*d*) 2 *Bulst.* 213.
(*e*) 2 *B.* & *A.* 470.

ment;

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ment; and if he were induced to sow, he ought to reap: to hold otherwise, would be a discouragement to production in the interval. In 1 *Rolle's Abridgement*, 726. (*Emblements*) it is laid down, that "If a lease be made to husband and wife during coverture, and the husband sow the land, and afterwards they be divorced *causâ præcontractus*, the husband shall have the corn, because the judgment is the act of the law." The same case is stated in *Oland* v. *Hardwicke* and in *Oland's* case (*a*), where the reason given is, "Because the sentence which dissolves the marriage is the judgment of the law, and *judicium redditur in invitum*." The debt or act of bankruptcy here, like the marriage there, was the act of the party; but the *fi. fa.*, or the commission of bankrupt, like the divorce there, is the act of the law, and being *in invitum*, the tenant is entitled to the emblements.

Russell. (*Stephen* Serjt. was with him.) In the case referred to the supposed husband never had any estate, for the supposed marriage was null, *causâ præcontractus*. But the great distinction is between forfeitures which arise out of the stipulation of the party, and those which accrue by operation of law alone. If they arise out of the stipulation of the party, it is immaterial whether an act of law or an act of the party be the immediate antecedent of the forfeiture; for if it be an act of law, it must be an act connected with and consequent on the act of the party, whereas when the forfeiture accrues by operation of law, it may depend on the act of God, or a third person, but is independent of the act of the party.

And where a lessor enters for condition broken, he is seised in his first estate, or of that estate which he had

(*a*) 5 *Rep.* 116 *a*.

at

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at the time of the estate made on condition. (*a*) And the lessor may annex what conditions he pleases, provided they be not illegal. *Roe* v. *Galliers* (*b*) (per *Ashhurst* J.) If a lease be made to a man, on condition that if he doth waste, or any like act, his estate shall cease, and he sows the land, and then does waste, the landlord shall have the *emblements*. (*c*) So, if there be lessee for life, on condition that if he does such an act at such a time, he shall only have the land for two years, and he sows the land, and afterwards breaks the condition, by which his estate for two years is finished before the severance of the corn, the landlord shall have the corn. (*d*) The argument as to discouraging cultivation between the act of the party and the consequent act of law, goes too far; for it would apply to cases where the landlord has to re-enter after forfeiture by simple act of law; as it can never be known beforehand whether he will take advantage of the forfeiture or not.

TINDAL C. J. In this case the tenant, *White*, held as lessee from year to year, subject to a condition of re-entry by the lessor, which was as follows: — "That if the lessee should commit an act of bankruptcy, whereon a commission should issue, and he should be declared bankrupt, or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of *fieri facias*, or other writ of execution should issue, it should be lawful for the lessor to re-enter into the demised premises, and the same again to have, re-possess, and enjoy, as in his former estate."

It appears that on the 11th of *May* the lessor entered for what he alleges to have been a breach of condition,

(*a*) *Co. Lit.* 201.
(*b*) 2 *T. R.* 133.
(*c*) 1 *Rol. Abr. Emblements* pl. 3.
(*d*) 1 *Rol. Abr. Emblements* pl. 4.

namely,

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namely, that the lessee contracted a debt, upon which he was sued to judgment, and execution by writ of *fieri facias* was issued against his effects; and the question is, whether the landlord, who finds corn growing upon his re-entry, has a right to such corn?

In the first place, this is not the case of an estate, the termination of which was originally uncertain. The estate of the lessee was certain at first, but liable to be defeated by a condition which he allowed to be inserted in the contract, and which was a lawful condition. It is sufficient that the condition is broken, to see that the landlord enters on his title paramount, and takes the property then as he had it originally. We might therefore decide this case on the distinction which exists between an estate, the determination of which depends on the breach of any condition entered into by the party, and an estate, the determination of which is rendered uncertain by operation of law. But it has been argued that the estate here was not determined by the act of the tenant, but immediately, at least, by act of law. The original act, however, on which the legal proceedings are founded, was the act of the tenant alone. Contracting the debt was his act; so, the refusal to pay, which brought on the suit and judgment; so, the omission to satisfy the judgment. The execution is the immediate and necessary consequence therefore of his own act. And it is not so clear that the entire breach of the condition should be the act of the tenant alone. On the contrary, there are cases in which the entire breach of the condition has not been complete by the single act of the party. As in *Bulwer* v. *Bulwer*, although the resignation was not complete till acceptance by the bishop, the title was forfeited by the clergyman's act of resignation. And the law is the same in cases where an estate is to be forfeited by surrender, although the surrender be not complete by the act of the tenant alone. There

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is no authority which decides that the act on which the lease is forfeited according to a condition, must be the sole and distinct act of the tenant alone. It has been urged, that this construction will occasion great inconvenience to the tenant for the doubtful interval between his original act and the landlord's re-entry, inasmuch as it is not certain that such act will be followed by legal proceedings, or by the landlord's re-entry. There is no doubt that such inconvenience may exist, but it is an inconvenience occasioned by the act of the lessee himself; and the argument goes too far, because even in cases where the forfeiture accrued indisputedly from the sole act of the lessee in the breach of a condition, an interval must elapse before it can be known whether the landlord elects to enter; and yet it is clear that upon such breach of condition he is entitled to enter. The principal authority which has been relied on in support of the Plaintiff's argument, is in *Oland's* case, in the Fifth *Reports*, and *Rolle's Abridgement*. There it is laid down, that if a lease be made to husband and wife during coverture, and the husband sow the land, and afterwards they be divorced, *causâ præcontractus*, the husband shall have the corn, because the judgment is the act of the law. But that was a case not of a condition, but of a limitation creating an estate of uncertain duration; for it was uncertain how long the relation of man and wife might continue; and it turned out that in consequence of some act before the supposed marriage, the parties were not in effect husband and wife, so that the lease was granted under an error as to the supposed fact; the just inference therefore is, that the estate was void by act of law. In the present case the landlord entered in consequence of the act of the lessee, and being in as of his former estate the damages must be reduced by the amount of the emblements, to which he was clearly entitled.

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GASELEE J. I am of the same opinion. There is great weight in the point relied on by the Defendant's counsel, that the landlord's re-entry was the consequence of a stipulation between the parties; but independently of that, there is sufficient to justify the application to reduce the damages. In the case put, of an estate during coverture, terminated by the dissolution of the supposed marriage, it was not the act of the party which dissolved the marriage, but the marriage itself was a nullity.

BOSANQUET J. I am of opinion that the lessor in this case is entitled to retain the emblements. It is distinctly laid down that a lessor is entitled to the emblements where he enters for condition broken, because he enters by title paramount, and is in as of his first estate. Then, has the lessor entered here for condition broken? It was stipulated between him and his tenant, that upon certain events he should re-enter and repossess the land as of his former estate, and having entered in consequence of one of those events he is entitled to emblements. But it has been urged that the condition here has not been broken, or has not been wholly broken by the tenant, because the stipulation between the parties for re-entry, requires that the act of the tenant shall be followed by an act of law, as the issuing of an execution or a commission of bankruptcy. It has also been contended that the completion of the forfeiture is the act of the lessor, and not the act of the tenant, because it depends on the lessor whether he will take advantage of the forfeiture or not. But that argument proves too much, for it would show that in no case would the lessor be entitled to emblements upon re-entry for a breach of condition; and the argument that the execution which gives the immediate right of re-entry is an act of law, and not the act of the lessee, is answered by saying that it is the consequence of the act of the lessee. In *Fauntleroy's*

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leroy's case an insurance company refused to pay the amount of an insurance on his life, on the ground, that when he was executed for forgery, his death was occasioned by his own act. For the Plaintiff it was contended that he died by act of law; but the House of Lords held that his death must be considered as occasioned by his own act. The case cited in *Oland*'s case does not apply, because there was no express condition broken, nor any stipulation for re-entry.

ALDERSON J. I am of the same opinion. *White*, the lessee, incurred a forfeiture by his own act; the lessor had stipulated, that if the lessee contracted a debt which should be followed up by judgment and execution, or committed an act of bankruptcy followed up by a commission, the lessor should re-enter and have the land as of his former estate. It seems to me that the legal consequences only qualify the act of the lessee, because that act pervades all the subsequent proceedings; for the commission could not issue unless there had been an act of bankruptcy, nor the execution unless there had been a previous debt; and if the lessee stipulates that in such case he shall be turned out of possession, it is by his own act that he is turned out.

Rule absolute.

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Nov. 26.

HOLMES *v.* SENIOR.

Upon service of a rule *nisi*, it is not necessary to shew the original rule, unless where it is proposed to bring the party into contempt.

GOULBURN Serjt. proposed to make absolute a rule to compute principal and interest, in an action on a bill of exchange, upon affidavit of service of a true copy of the rule *nisi*.

The officer of the court objected, that the affidavit ought to have alleged that the original rule was shewn at the same time.

Goulburn. In the King's Bench the practice is not to exhibit the original rule, except where it is proposed to bring the party into contempt. In all other cases it is sufficient to depose to service of a copy of the original rule; and though *Tidd* says, it *seems* to be the practice in C. B. to produce the original rule in all cases, the authorities rather confirm the practice of K. B. [*Bosanquet* J. In *Westley* v. *Jones* (*a*), it was held necessary to shew the original rule if it were demanded.]

TINDAL C. J. The distinction in the Court of King's Bench seems well founded. It is only necessary to shew the original rule, where it is proposed to bring the party into contempt.

Rule absolute.

(*a*) 5 *B. M.* 162.

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HAYDON, Assignee of SUTTON, a Bankrupt, *v.* WILLIAMS.

Nov. 26.

ASSUMPSIT for work and labour performed by *Sutton* as a surgeon and apothecary, and for medicines delivered to the Defendant, in 1820. The declaration was in the common form, and of *Michaelmas* term 1828.

At the trial before *Tindal* C. J., *London* sittings after last *Hilary* term, the Plaintiff called as a witness *Sutton* the bankrupt, who stated, that about *Midsummer* 1823, he had received a letter from the Defendant, which he had since lost, and searched for in vain, in which letter the Defendant, referring to a demand for payment of his debt, said, that he was incapable then of paying the money, but would pay as soon as he had it in his power, and begged that instructions which had been given for suing him might be countermanded.

It was objected on the part of the Defendant, that oral evidence of the written acknowledgment of the debt ought not to have been received; and that the evidence, when received, did not sustain the declaration, which supposed an absolute, not a conditional promise.

A verdict was taken for the Plaintiff, subject to a motion for a nonsuit on these points.

1. Where a written promise to pay a debt barred by the statute of limitations, has been lost, oral evidence of the contents of the writing may be given.

2. Such a promise, if conditional, must be declared on as conditional, notwithstanding the 9 *G.* 4. *c.* 14., and notwithstanding it was given within six years from the time of contracting of the debt.

Jones Serjt. moved accordingly, in *Easter* term; urging that, by admitting parol evidence of an acknowledgment of a debt barred by the statute of limitations, the whole object of the statute 9 *G.* 4. *c.* 14., which requires that such acknowledgments shall be in writing, would be defeated; and he referred to *Willis* v. *Nuneham*,

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Nuneham (*a*), where an oral acknowledgment of the payment of part of a debt within six years, was held not sufficient within the statute 9 *G.* 4. *c.* 14., to take the case out of the statute of limitations. But even if the evidence were admissible, a written acknowledgment under that act ought at least to be as clear as an oral acknowledgment before the act: but an oral acknowledgment before the act, containing a promise to pay when of ability, was no more than a conditional promise; must have been declared on as such; and the ability must have been alleged and proved. In *Tanner* v. *Smart* (*b*), where in assumpsit brought to recover a sum of money, the Defendant pleaded the statute of limitations, and upon that issue was joined; at the trial the Plaintiff proved the following acknowledgment by the Defendant within six years; — "I cannot pay the debt at present, but I will pay it as soon as I can;" — it was held that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay.

A rule *nisi* having been granted,

Wilde Serjt. shewed cause in *Trinity* term.

The secondary evidence of the writing was properly admitted. The statute 9 *G.* 4. *c.* 14., was not designed to alter the rules of evidence as to the proof of written instruments; and when a written instrument is shewn to have been lost, the admission of secondary evidence of its contents is a matter of course. There is no kind of written instrument which affords any exception to this rule. *Willis* v. *Nuneham* only decided that secondary evidence could not be received of a *parol* acknowledgment. If, then, the existence of the writing be proved, all is proved that the act requires, to entitle the Plaintiff to recover. For the acknowledgment contained in it,

(*a*) 3 *Young & Jar.* 518. (*b*) 6 *B. & C.* 603.

though

though conditional, was made within six years after the original debt was incurred. It may be conceded, that an acknowledgment made after the six years must be absolute, to support a declaration on a supposed absolute promise; and if it be a conditional acknowledgment, it must be declared on as such; but a conditional acknowledgment made within the six years has the same effect as an absolute acknowledgment; and this was the opinion of two of the Judges in *Scales* v. *Jacob* (*a*); for by the acknowledgment, the party admits the debt, and during the six years he cannot attach any condition to the payment. In *Tanner* v. *Smart*, Lord *Tenterden* says, "The constant replication ever since the statute, to let in evidence of an acknowledgment, is, that the causes of action accrued (or the defendant made the promises in the declaration), within six years; and the only principle on which it can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and as such constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds." In the present case, it is clear that the Defendant's acknowledgment would have supported the declaration, if the action had been brought within the six years: and as the Defendant when he made the acknowledgment had no right to attach any condition as to the time of payment, it must be considered as an acknowledgment without condition, and so, as available in support of this declaration after the six years, as before.

Jones. Whether the acknowledgment be made before or after the expiration of the six years, if the action

(*a*) 3 *Bingh.* 638.

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be brought after the six years, it is the sole cause of the Plaintiff's action, for the original right is then annulled. If it be the sole cause of the Plaintiff's action, it must be declared upon according to the fact; and if in fact it be a conditional acknowledgment, it will not bear out a declaration alleging an absolute promise. In *Tanner* v. *Smart*, the acknowledgment was also made within the six years, but the action being brought after, it was held this principle applied. In *Fearn* v. *Lewis* (*a*) where, in a letter addressed to a friend of the Plaintiff, the Defendant said, "Mr. *F.*'s claim, with that of others, shall receive that attention that, as an honourable man, I conceive them to deserve, and it is my intention to pay them; but I must be allowed time to arrange my affairs, and if I am proceeded against, any exertion of mine will be rendered abortive;" It was held, not an unqualified acknowledgment, from which the Court could imply a sufficient promise to pay to take the case out of the statute of limitations.

Cur. adv. vult.

TINDAL C. J. The Defendant in this case sets up the statute of limitations as a bar to the Plaintiff's demand, and the only question is, whether the written letter of the Defendant, signed by him, of which letter we think secondary evidence was rightly admitted at the trial, is such "an acknowledgment, or promise in writing, signed by the party chargeable thereby," as falls within the meaning and intent of 9 *G.* 4. *c.* 14.

That statute did not intend, as it appears to us, to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof; substituting the certain evidence of a writing signed by the

(*a*) 6 *Bingo.* 349.

party

party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses.

To enquire, therefore, whether, in a given case, the written document amounts to an acknowledgment or promise, is no other enquiry than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar operation and effect.

In the present case, the written letter so closely corresponds with the parol promise in *Tanner* v. *Smart* (*a*), decided the year before the statute passed, that we hold ourselves governed in the construction of it by the decision in that case. In the letter, the Defendant writes "That he was incapable at that time to pay the money, but that he would pay as soon as he had it in his power to do so." In the case referred to, the defendant says "I cannot pay the debt at present, but I will pay it as soon as I can." The most acute and discriminating mind cannot form a distinction between the effect of the two expressions. The principle laid down by the Court in that case, and which is deduced from the former decisions, was, that the promise which is given in evidence under the general replication to the statute of limitations must be one which is consistent with the promises laid in the declaration; and consequently, that evidence of a conditional promise will not support an absolute promise in the declaration. So here also we think the promise to pay by the Defendant in his letter, being guarded with the condition of his being able to pay, whether it is taken as a new promise, or a revival of the former, is a departure from the absolute promise laid in the declaration.

It has been urged in argument, that if the action had been brought within the six years next after the original

(*a*) 6 *B.* & *C.* 603.

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cause of action, this letter would have been evidence of an acknowledgment of the debt, and would have supported the action. And undoubtedly it would; for a promise to pay, whether absolute or conditional, does necessarily include an acknowledgment of the debt; and where the Defendant is charged on his original liability, he cannot limit the effect of any acknowledgment which he makes, by adding to it any new condition. But where the action is brought after six years, and the subsequent acknowledgment of the defendant is the very ground of his action, the plaintiff must take it altogether as he finds it, and cannot use the acknowledgment without annexing the qualification also.

Without, therefore, determining whether such a promise ought or ought not to be specially declared upon, it is sufficient to say, that in this case there was no proof of the Defendant's ability to pay at the time of the action brought, so as to satisfy the condition, and make the promise absolute and unqualified, like those in the declaration.

Upon this ground we think the case is not taken out of the statute, and that the rule for entering a nonsuit must be made absolute.

Rule absolute.

STANIFORTH *v.* LYALL and Others.

Nov. 27.

THIS was an action of covenant, in which the Plaintiff complained of certain breaches of the covenants contained in a charterparty made between the parties, dated the 7th day of *November* 1825.

All matters in difference were referred by a Judge's order, containing the usual terms, to *E. H. Alderson*, Esq., who ordered a verdict to be entered forthe Plaintiff for 1*s.*; and found specially,

That the ship *Sesostris* was chartered by the Plaintiff to the Defendants by a charterparty, containing, amongst other things, the following stipulations; namely, that after discharging the cargo at *Port Jackson* she should proceed to such port or ports in the islands of *New Zealand* as the said freighters or the agent of their firm at *Port Jackson* or in *New Zealand* should direct, or, in the absence of such direction, then to that port or place in the said islands at which, upon enquiry to be made by him for that purpose at *Port Jackson* previously to the said ship's sailing thence, the commander might ascertain that Captain *James Herd*, the superintendant or principal agent of the firm in *New Zealand*, or other the superintendant or principal agent of the firm for the time being there, was settled; or in case he could not obtain certain information respecting that fact, then to the *Bay of Islands*, where the said commander would ascertain the port or place of the settlement; and accordingly, the said ship or vessel

Defendants chartered a ship to *New Zealand*, where they were to load her, or by an agent there to give Plaintiff, the owner, notice that they abandoned the adventure; in which case they were to pay him 500*l.* The ship went to *New Zealand*, but found neither agent nor cargo there, and the captain made a circuitous voyage home, by way of *Batavia*. This voyage, after making every allowance for increased expense and loss of time, was more profitable than the original adventure to *New Zealand* would have been.

Plaintiff having sued Defendant on the charterparty for breach of covenant, held, that he could not recover the 500*l.* penalty in addition to the profit of the homeward voyage.

should

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should forthwith proceed thence to the same port or place: and the same ship having arrived at the port or place in *New Zealand*, to which she was to proceed as aforesaid, or as near thereto as she could safely get, the said commander should give notice in writing of such her arrival to the said *James Herd*, or other the superintendant or principal agent of the said firm for the time being there, and deliver to him the letter intrusted to the care of the said commander; and the said ship or vessel should, if necessary, wait fourteen clear days after the delivery of such notice, for the decision of such superintendant or principal agent, or other the agent of the said firm at the said island, whether to load the said ship with a cargo for a port in *Great Britain* or not; and in case the said *James Herd*, or other such superintendant or principal or other agent, should, before the expiration of such fourteen days, give notice in writing to the commander of the said ship of his determination not to load the said ship with a cargo for a port in *Great Britain*, then at and from the expiration of the same fourteen days, the voyage of the said ship in the service of the said freighters should be at an end: but if the said superintendant or principal or other agent of the said firm for the time being should not before the expiration of the said fourteen days give such notice as last aforesaid, then such ship should, either at the port or place to which she should have been originally ordered, or at such other port or place, or ports or places, in *New Zealand* as the said superintendant or principal agent for the time being should direct, and within the lay-days or days of demurrage thereinafter mentioned, receive and take on board from such superintendant or other the agent or agents, or servants, of the said firm, such masts, spars, and timbers, or all or any of the same, or any such other lawful goods or merchandize as the said superintendant

or

or principal or other agent or agents might tender for that purpose, not exceeding what the said ship could reasonably stow and carry, over and above her stores, tackle, apparel, provisions, and furniture; and the master of the said ship should sign the customary bills of lading for the said cargo; and the said ship being so loaded, and afterwards despatched, should therewith proceed with all convenient speed to such port in *Great Britain* as the said freighters or the superintendant or principal agent of the said firm in *New Zealand* should direct, and make a right and true delivery of the said cargo.

The Defendants also stipulated, that in case the said ship should, according to the true intent and meaning of that charterparty, proceed to, and arrive in *New Zealand*, and end her voyage there, the said freighters, their executors, administrators, or assigns, should and would, upon the receipt in *England* of a certificate to that effect from the superintendant or principal agent of the said firm, or of the notice which should have been given by the said superintendant or principal or other agent, of his determination not to load the said ship as aforesaid, pay to the said Plaintiff the sum of 500*l.* as and in full for the freight or hire of the said ship for the voyage which should be so ended.

The rate of freight at which the cargo, if loaded, on board at *New Zealand*, was to be carried to *England*, and the mode of its payment, were also stipulated for in the said charterparty.

Under this charterparty the ship sailed, and duly arrived in *New Zealand*, but no agent on the part of the Defendants was there, nor were the Defendants, or any one on their behalf, ready to load a full and complete cargo on board, pursuant to the charterparty; nor was there any agent of the Defendants in *New Zealand* to give

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give the notice for putting an end to the voyage. The ship, after waiting a reasonable time without being able to hear any thing of the agent of the firm at *New Zealand*, sailed in ballast from *New Zealand* round by *Batavia* for *England*. At *Batavia*, in her passage home, she obtained a full cargo of spices and other goods for *England*, and arrived in safety. After taking into consideration the delay in *New Zealand*, and that arising from the more circuitous voyage by *Batavia* to *England*, and the wear and tear of the ship, and the increased expenses of the homeward voyage arising therefrom, and setting on the other side the more valuable freight earned by the ship than she would have earned by carrying home a full cargo from *New Zealand* pursuant to the charterparty, the voyage from *New Zealand* by *Batavia* to *England* was, on the whole, more profitable to the Plaintiff than if the vessel had been fully loaded by the charterers at *New Zealand* with a cargo, and had brought such cargo in safety home in the usual course of the voyage.

Under these circumstances, the arbitrator thought the Plaintiff entitled to a verdict, there having been a breach of the contract, but that he ought to recover such damages only as he had actually sustained in consequence thereof. He thought that the event in which alone the 500*l.* were due had not happened; and that if it had, the Plaintiff would have been entitled to that sum, and no more, whatever might have been the ultimate actual loss sustained by him. If, however, he did wrong in taking into consideration the profits actually earned by the freight from *Batavia* to *England*, then the damages which would have been sustained by the Plaintiff would clearly have exceeded 500*l.*, to which sum, however, the Plaintiff consented to limit his claim. If, therefore, the Court thought that the homeward freight actually earned ought

ought not to have been taken into account at all, the arbitrator awarded that the verdict should be entered for the Plaintiff, with 500*l.* damages; but if otherwise, then with nominal damages only, there having been a breach of the agreement, by which, however, as events had turned out, the Plaintiff had been a gainer.

Stephen Serjt., on the part of the Plaintiff, contended that he was entitled to the profits made on the homeward voyage, and to the penalty of 500*l.* incurred by the Defendants on their not procuring a cargo for the ship at *New Zealand*, pursuant to their engagement. The moment that engagement was violated, the Plaintiff had a vested interest in a claim for damages, equal to what would have been earned if the contract had been performed; not less than 500*l.*; of which interest he could not be deprived by the event of the subsequent voyage. *Atkinson* v. *Buckle* (*a*), *Edwin* v. *East India Company* (*b*), *Blight* v. *Page* (*c*). The vessel was there thrown on his hands; he was at liberty to employ her as he thought fit. If the Plaintiff had had an agent at *New Zealand*, the agent might have received the money, and have despatched the vessel to any quarter for the Plaintiff's benefit. The captain must be deemed his agent for this purpose; and as the vessel's subsequent employment was at the Plaintiff's risk, so also it was for his benefit. If the vessel had perished in the voyage from *Batavia*, the loss would have fallen on him; and as that loss would have occurred in a voyage not contemplated in the charterparty, — a voyage extending over a space and time different from that described in the charterparty, — the Plaintiff was fairly entitled to the benefits of the voyage, since he must have sustained the risk and expense of it, and the

(*a*) 2 *Bulst.* 152.
(*b*) 2 *Vern.* 210.
(*c*) 3 *B. & P.* 295 (n).

loss

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loss of any fresh opportunity of employing the vessel which might have presented itself in the interval between the probable time for arrival in *London* from *New Zealand*, and the actual time of her arrival after the protracted and circuitous voyage. It could never be permitted to the Defendants, a party in default, to say that the Plaintiff should incur risk in consequence of such default, and yet be deprived of the profit if the risk should terminate profitably. If the contract had been observed, the Plaintiff would have had the 500*l.* dead freight *plus* the additional earnings; the Defendants therefore could not contend that he should be satisfied with the additional earnings *minus* the dead freight.

Bell v. *Puller* (*a*) is not essentially distinguishable from the present case. That was an action of debt on charterparty. Plaintiff let a ship to freight to defendants, from *London* to *Petersburg*, or some other port in the *Baltic*, there to unload and deliver to correspondents of defendant; and plaintiff would immediately receive on board from the correspondents a full cargo of goods, and return to *London* and end the voyage: Defendants covenanted to put on board at *St. Petersburg* such return cargo, and on arrival in *London* to pay plaintiff for the freight 11*l.* 11*s.* *per* ton, with ten *per cent.* primage to be paid on delivery: and plaintiff covenanted, that if political or other circumstances should prevent the shipping a return cargo or discharging the outward cargo, defendants and their correspondents should be at liberty to detain the ship at *St. Petersburg* forty days; and after the forty days, without such outward cargo being unloaded, and consequently without the return cargo being loaded, plaintiff should be at liberty to return to *London*, and on her arrival defendants would pay 2700*l.* *sterling*,

(*a*) 2 *Taunt.* 285.

with

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with ten per cent. &c. Breach, that vessel arrived at *St. Petersburg*, but defendants did not receive the homeward cargo, nor load any return cargo, nor direct to any other port in the *Baltic*; and that the ship remained the forty days at *St. Petersburg* without unloading, and plaintiff returned with her to *London*; yet defendants did not pay the 2700*l.* with the ten per cent. &c. Plea of set-off for money had and received. It was proved that on arrival of the vessel at *St. Petersburg*, the state of the country was such that the vessel was not permitted to unload; that the master applied to defendant's agents, who refused to give directions; whereupon the master, after the forty days, set sail for *Stockholm*, where he took in hemp, which he stowed on a cargo of lead brought out, and received for freight on it 2278*l.* To obtain that freight the master waited at *St. Petersburg* several days after the expiration of the forty, and incurred expenses. The jury gave a verdict without deduction for the 2700*l.*, and *Best* moved that the verdict might be reduced by deducting all the freight earned on the homeward voyage. *Mansfield* C. J., in delivering the opinion of the Court, said, "Considering this as a mere contract to bring certain goods to *England*, I see no reason why the captain may not earn what else he can by taking other goods on board for his own benefit."

Wilde Serjt., *contrà*, was stopped by the Court.

TINDAL C. J. In this case the charterparty has contemplated an event, on the happening of which 500*l.* was to be payable by the freighter to the owner of the vessel; which event was the vessel's arriving at *New Zealand*, and the agent of the freighter there giving notice that he had no cargo to put on board. But the freighter

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freighter also engaged to find a return cargo: the event provided for never took place: the parties, therefore, are in the same situation as if the charterparty contained no stipulation on the subject, and this were an action to recover damages for breach of a general contract. The arbitrator was of that opinion; and after considering all the vessel had earned, he finds that the Plaintiff was overpaid, and therefore entitled to nominal damages only for the breach of covenant. It has been argued that the 500*l.* was payable at all events; but, supposing that to have been paid, the freighter could not have been responsible for further damages; whereas, in the view the Court takes of the case, he might obtain much more if the ship earned it: but he is not to take the contract both as a close and as an open contract. The event which would have rendered it a close contract never took place; the contract, therefore, was an open or general contract, on the breach of which, as the Plaintiff sustained no damages, the verdict was properly entered up for a shilling.

GASELEE J. I am of the same opinion. This was a contract by the Defendant, to load the Plaintiff's ship at a certain rate of freight; but an option was given to the Defendant in one case, to relieve himself from the undertaking to provide a freight, and to pay 500*l.* instead. But in order to have been let off for that sum, he was to have taken a step which he has not taken; and as the contract cannot be open in one sense and close in another, unless he takes that step he is liable to general damages on the breach of it. Unless in an event which has not taken place, and on which the Plaintiff was to receive 500*l.* only, the Defendant was to find a return cargo and to pay the freight; he has failed to do that, but instead, the Plaintiff has got a much better

better bargain. The case of *Bell* v. *Puller* is not at variance with the present decision, because there the event *had* happened on which the Defendant was to pay the stipulated sum.

BOSANQUET J. I am of the same opinion. This is an action for the breach of engagements contained in a charter-party. If the event had happened on which the stipulated damages were to be paid, the Plaintiff would have been entitled to the sum agreed on; but if not, to general damages on the breach of contract proved. The particular event contemplated has not happened. The Defendant was at liberty to have ended the voyage at *New Zealand*, on giving notice to the Plaintiff's agent and paying 500*l.*, which the Plaintiff was to have accepted in lieu of all other damages; but as that event never took place, the Plaintiff was entitled to sue for unliquidated damages. It has been urged that the Plaintiff has a vested right, when it was ascertained that there was no cargo for the vessel at *New Zealand*. But it will be scarcely contended that his right to damages was confined to that moment; and we think, that under all the circumstances of this case, the Plaintiff is entitled to all damages incurred previously to the action; if so, he is bound to account for all advantages obtained during the same period. In calculating the damage, we must also take into account the benefit obtained. In the one case, the Plaintiff would have been entitled to recover more than 500*l.* if loss to a greater amount had been sustained; but if, instead of incurring loss he has made a profitable voyage, allowance must be made to the Defendant for such profit, subject to a verdict for nominal damages, inasmuch as the contract has been actually broken.

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ALDERSON J. The opinion which I formed of this case as arbitrator has not been changed. I then viewed it as a breach of contract to put a cargo on board the Plaintiff's vessel, for which the Plaintiff was entitled to recover all the damages he had incurred.

The argument for the Plaintiff does not go far enough, or it goes too far. If he wishes for the 500*l.* only, it does not go far enough for his purpose; if he asks, in addition, for all that was earned on the voyage home, it goes too far, for the 500*l.* was to be paid in lieu of a cargo, if the Defendant gave notice to that effect at *New Zealand*. But when the captain went round by *Batavia*, he went at the risk and for the benefit of the freighter. If he had incurred loss, the freighter must have been responsible, but as there was a clear profit, the Plaintiff is only entitled to nominal damages for the breach of contract.

Rule discharged.

Nov. 29.

MATTHEW BEARPARK *v.* HUTCHINSON and MARY his Wife.

A rent-charge *pur autre vie*, if grantee dies living *cestui que vie*, goes to grantee's executor, though not named in the grant.

REPLEVIN for taking cattle, &c. The Defendants avowed that the Plaintiff being seised for life, and *Dixon Bearpark* having the reversion in fee of the premises in which, &c. conveyed them by indentures of lease and release, to *Lupton Topham*, upon trust to permit and suffer the said *Dixon Bearpark* to receive and take thereout one clear annuity or yearly rent-charge of 60*l.* a year, by equal half-yearly payments, that is to say, on the 6th day of *April*, and the 10th day of *October*, in every year during the life of the said Plaintiff; the first half-yearly payment to commence and

to

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to be made on the 10th day of *April* next ensuing the date of the said indenture; and subject to the said annuity or yearly rent-charge, to the use of the said Plaintiff and his assigns, for and during the term of his natural life, without impeachment of waste, and from and after the determination of that estate by forfeiture or otherwise in his life-time, to the use of the said *Lupton Topham*, his heirs and assigns, upon trust to support the contingent trust estates thereinafter limited, and by the usual ways and means to preserve the same from being defeated or destroyed, but nevertheless to permit and suffer the said Plaintiff and his assigns, to receive and take the rents, issues, and profits thereof, for and during the term of his natural life, for his and their own proper use and benefit. (Then followed limitations in remainder to *Dixon Bearpark* for life, and his children in succession.) And it was by the said last-mentioned indenture expressly provided amongst other things that if the annuity or yearly rent-charge of 60*l.* should be behind or unpaid by the space of twenty-eight days next after either of the said days of payment, then it should be lawful for the said *D. Bearpark*, and his assigns, to enter upon the said dwelling house and closes in which, &c., and the cattle and goods, &c. there found, to distrain and carry away, impound or otherwise to sell and dispose of according to law, till the annuity should be paid. By means whereof, the said *Dixon Bearpark* became and was seised of and in the said yearly rent-charge of 60*l.* for the term of the natural life of the said Plaintiff.

And the said Defendants further said, that the said *D. Bearpark* on the 10th day of *February* 1824, to wit, at, &c., departed this life without having assigned over or parted with the said rent-charge, after the death of him the said *Dixon Bearpark*, so accruing as aforesaid during the life of the said *Matthew Bearpark*; and that after the death of the said *Dixon Bearpark*, administration

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nistration of all and singular the goods and chattels, rights and credits which were of the said *D. Bearpark*, who died intestate, in due form of law was granted to the said Defendant, *Mary*. By means of which said premises, the said Defendants, in right of the said *Mary*, as administratrix as aforesaid, became and were seised of the said rent-charge for the term of the natural life of the said Plaintiff; and because 360*l.* of the said rent-charge (after the death of the said *D. Bearpark*, and after the making the said last mentioned indenture, and the said Plaintiff being living and in full life), for six years ending on the 6th day of *April* in the year aforesaid, become due, owing and in arrear to the said Defendants, and because the said last mentioned arrears of the said rent-charge were and remained behind and unpaid by the space of twenty-eight days next after the respective days of payment thereof, and from thence until and at the said time when, &c. were in arrear and unpaid to the said Defendants, they avowed the taking of the said cattle, goods, and chattels, in the said dwelling house, and closes respectively, in which, &c. and justly, &c. for and in the name of a distress for the said arrears of the said rent-charge.

The Plaintiff pleaded that before any part of the rent-charge, mentioned in the avowry, became due, *Dixon Bearpark* died.

Demurrer inde, and joinder.

Wilde Serjt. in support of the demurrer.

Dixon Bearpark, the grantee of the rent-charge *pur autre vie*, being dead, living the *cestui que vie*, the rent does not expire or go to the heir of the grantee as a descendible freehold, but belongs to the avowants, as administrators of *Dixon Bearpark*, by virtue of the statute 29 *Car.* 2. *c.* 3. *s.* 12., which is as follows: — "And for the amendment of the law in the particulars following, be

be it enacted, that from henceforth *any* estate *pur autre vie* shall be devisable by a will in writing, signed by the party devising the same, or by some other person in his presence and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy as assets by descent, as in the case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof, by virtue of the grant, and shall be assets in their hands."

It will be urged on the part of the Plaintiff, that the statute applies only to estates of which there can be an occupancy: that there can be no occupancy of a rent-charge; and that, therefore, the rent expires.

But first, the statute enacts that *all* estates *pur autre vie*, without distinction, shall be devisable. It is clear, therefore, that this rent-charge might have been devised, whether susceptible of occupancy or not, 2 *Bac. Abr. Estate for Life and Occupancy*, (B); and if devisable, it seems also within the meaning of the statute that it should go to administrators as assets for distribution: otherwise the statute would merely enable an insolvent testator to cheat his creditors, by devising the rent-charge away. For it is clear, that if devised, it is liable to the creditors as assets: *Westfaling* v. *Westfaling*. (*a*)

In *Rawlinson* v. *Duchess of Montague and Others* (*b*), Lord Keeper *Harcourt* lays it down, "If, since that statute, a rent be granted to *A.* for the life of *B.*, and *A.* die leaving *B.*, *A.*'s executors or administrators shall have it during the life of *B.*, for the statute is not only made to prevent the inconvenience of scrambling

(*a*) 3 *Atk.* 460. (*b*) 3 *P. Wms.* 264 *n.*

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for estates, and getting the first possession after the death of the grantee, but likewise for preserving and continuing the estate during the life of the *cestui que vie*; and it is reasonable, since the grantee might by deed have disposed of the rent during the life of the *cestui que vie*, that though, by his dying without having made any such disposition in nicety of law this estate would have determined, yet, by the statute, that interest which passed from the grantor ought to be preserved, and shall go to the executors or administrators of the grantee during the life of the *cestui que vie*. And the statute in this case does not enlarge, but only preserve, the estate of the grantee."

But in the ordinary acceptation of the term, there may be a special occupant of a rent-charge. Special occupancy bears no relation to general or actual occupancy; it means only a capability of enjoyment, and the expression is adopted by the statute as a term known to the law. Lord *Coke* says (*a*), that both in annuities, and in any other thing that lieth in grant, the heir shall take to prevent an occupant. And in *Hassell* v. *Gowthwaite* (*b*), *Willes* C. J. says, "The law, therefore, before the statutes seems to be clear that there could be no general occupant of a rent, and for this reason, because there can be no entry on a rent according to the rule laid down in *Co. Lit.* 41., that there can be no general occupant of any thing that lies in grant. But the books seem to agree that the heir might be a special occupant of a rent, though not properly called an occupant, but rather a person who takes by the express words of the grant, and therefore may most properly be called a special grantee or assignee." In *Doe* v. *Luxton* (*c*), Lord *Kenyon* says, that the heir of the grantee of an estate *pur autre vie*, to him and his heirs will take as special occupant; a principle which is

(*a*) *Co. Litt.* 388 *a*. (*b*) *Willes*, 505. (*c*) 6 *T. R.* 292.

confirmed

confirmed by Lord *Eldon* in *Ripley* v. *Waterworth* (*a*), where all the cases are collected. To the same effect is 2 *Roll. Abr.* 151. (G) pl. 2., cited by Lord *Hardwicke* in *Westfaling* v. *Westfaling*. So in *Kendal* v. *Micfeild* (*b*), a nominee of a rent-charge *pur autre vie*, after the death of the grantee, is styled a special occupant. It is true that *Blackstone* has expressed some doubt on the point in 2 *Comm.* 259. But that doubt is opposed by Professor *Wooddesson*; and in 2 *Sand. on Uses*, 306. n. it is said, that where a rent-charge *pur autre vie* is granted to one and his heirs, the heir takes as *quasi* special occupant. (*c*)

Goulburn Serjt. *contrà*. The rent expired on the death of the parties; for the statute 29 *Car.* 2. applies only to estates of which there can be an occupancy, and there can be no occupancy of a rent-charge.

This was established by many authorities before the statute, and the statute has not altered the nature of estates, although it has altered their distribution.

In *Holden* v. *Smallbrook* (*d*), it was decided that if a rent be granted to *A.* during the life of *B.*, and *A.* die, living *B.*, the rent is determined; because, "no occupant could be of it." In *Crawley's* case (*e*) it was agreed, there cannot be an occupancy of a rent. So in *Salter* v. *Butler* (*g*); even though executors and administrators were named in the grant. So, *Vin. Abr. Occupant*, (C). 2 *Bac. Abr.* (B). *Estate for Life and Occupancy.* And the reason is, that rent, as being incorporeal, is incapable of occupancy. There can be no entry on a rent. (*h*)

(*a*) 7 *Ves.* jun. 425.
(*b*) 15 *Vin. Abr. Mortgage*, 457. (O). 3 *Barnardist.* 46.
(*c*) See also *Watk. Princip. Conv.* p. 69. *Of Estates pur autre vie*, and *Bythewood's* edition of *Noye's Maxims.*
(*d*) *Vaugh.* 199.
(*e*) *Cro. Eliz.* 721.
(*g*) *Id.* 901. *Moor.* 664. *Vaugh.* 200.
(*h*) *Willes*, 505.

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Lord *Coke* defines title by occupancy as follows: "If the lessee *pur autre vie* dieth, living *cestui que vie*, he that first entereth shall hold the land during that other man's life, and is in law called an *occupant*, because his title is by his first occupation (*a*):" and the same definition is given in *Viner's* and *Bacon's Abridgments*. It is true that Mr. *Butler* (*b*) says, that "if heirs are named in the grant, they shall take:" they take, however, not as special occupants, but a descendible freehold, and the position in *Lit. s.* 739. on which Mr. *Butler's* opinion rests, begins with an "*on dit*" and ends with a "*quære.*" (*c*) And in *Doe* v. *Martin* (*d*), *De Grey* C. J. says, "The term special occupant is in such cases a very forced and improper phrase, and I think there is great weight in what is said by *Vaughan* (201.), that the heir takes it as a descendible freehold." Indeed the heir takes, whether named or not, even where executors *are* named. *St. John's College* v. *Fleming*. (*e*)

Then, has the statute, which applies only to estates whereof there can be an occupancy, made that capable of occupancy which was incapable before? *Blackstone* says (*g*), "As by the common law no occupancy could be of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like, (because with respect of them, there could be no actual entry made, or corporal seisin had, and therefore by the death of the grantee *pur autre vie* a grant of such hereditaments was entirely determined,) so now I apprehend, notwithstanding these statutes, such grant would be determined likewise." What Lord Keeper *Harcourt* said, is stated in the report not to have been the point in the case. The

(*a*) *Co. Lit.* 41 *b.*
(*b*) In note 3 to *Co. Lit.* 41 *b.*
(*c*) But *Coke* in the commentary on the passage, says the case is without question.
(*d*) 2 *Bl. Rep.* 1150.
(*e*) 2 *Vern.* 320.
(*g*) 2 *Bl. Com.* 259, 260.

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same observation applies to the passage in *Willes*, and *Barnardiston* is a book of no authority. But copyholds, which Lord *Hale* in his MSS. (*a*) couples with rents, have been holden not to be within the statute. (*b*) *Zouch* v. *Forse* (*c*), *Doe* v. *Martin* (*d*), *Smartle* v. *Penhallow*. (*e*)

But at all events the avowants had no right to distrain; the power of distress being given only to the grantee and his assigns; not to his executor. A power of distress for a rent-charge is strictly construed, so much so, that heirs cannot distrain unless named in the grant. (*g*)

Wilde in reply. As to the power of distress, it was clearly the intention of the parties that it should continue as long as the rent-charge, viz. during the life of *Matthew Bearpark*.

The statute is remedial, and must be construed liberally; and in order to carry the whole clause consistently into effect, it must be taken that the expression "special occupant" was used rather in its common acceptation, than with any reference to its strict technical meaning, as derived from feudal institutions. No answer has been attempted to the argument deduced from the first part of the clause which makes *all* estates *pur autre vie* devisable, whether capable of occupation or not.

Cur. adv. vult.

TINDAL C. J. The point raised upon the pleadings in this cause, for the consideration of the court, is this,

(*a*) *Butler's* note 3 to *Co. Lit.* 41 *b.*

(*b*) *Holt* C. J. 2 *Ld. Raymd.* 1000.

(*c*) 7 *East*, 186.

(*d*) 2 *Bl. Rep.* 1150.

(*e*) 1 *Salk.* 188. 6 *Mod.* 63.

(*g*) *Co. Lit.* 147 *b.* *Bradly on Distr.* 22.

Whether,

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Whether, if a rent-charge be granted to a man during the life of another, and the grantee dies during the life of *cestui que vie*, the right to the rent-charge vests in the persoual representative of the grantee?

At common law, before the statute 19 *Car.* 2. *c.* 3. it seems to be the better opinion, that such a rent-charge would have *determined* by the death of the grantee; because there is no one to take under the grant. (*a*) But the question is, Whether, since the statute above referred to, the executor of the grantee cannot make title to the rent-charge during the continuance of the life of *cestui que vie.*

The fifteenth section of that statute enacts that *for the amendment of the law* in the particulars following, from thenceforth *any estate pur autre vie* shall be devisable by a will in writing, executed as therein mentioned; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in case of lands in fee simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

The clause in question is expressly passed for the *amendment of the law*; denoting by that expression, that there was some general inconvenience in the law as it then stood, with respect to the estate of tenant *pur autre vie.* The clause, therefore, is to receive a liberal construction; and the provisions of the act are to be extended as far as the words of the act will admit, to every case where the subject matter of the clause calls for a remedy.

The clause contains two provisions; one declaring

(*a*) *Salk.* 188. *Vaugh.* 199.

estates

estates *pur autre vie* to be devisable; the other, making them assets in the hands of the heir, or the executors or administrators.

With respect to the first provision, it declares *any* estate *pur autre vie* to be devisable. It will be impossible to contend that the grantee of a rent-charge *pur autre vie* had not an estate *pur autre vie* in the rent-charge, or that the inconvenience of such grantee being unable to devise his interest, is not as great as that of the tenant *pur autre vie* in lands. It must be conceded, therefore, that an estate *pur autre vie* in a rent-charge, falls within the first branch of the section, and is devisable. But if it is comprehended within the first branch, it is extremely difficult to put any construction on the second branch, so as to exclude it from that also; for the section goes on thus: — "And if no such devise *thereof* be made, the same shall be chargeable, &c.;" evidently intending that the second branch of the section shall be as comprehensive as the first, and shall relate precisely to the same subject matter. And if this be the just construction, the second branch would govern estates *pur autre vie* in rents, as well as in any lands or tenements, and such estates would pass to the personal representative of the grantee, where the heirs are not named in the grant.

The argument on the part of the Plaintiff is, that the second part of the section is not to be applied to all estates *pur autre vie*; but that it is limited and restrained to such estates as were capable, before the statute, of occupancy; and that as there could be no occupant of a rent-charge, inasmuch as it lay only in grant, and was not capable of actual possession, so such estate was not within the statute.

It may certainly be conceded that there could not be any *general occupant* of a rent, for the reasons above assigned. That is, if the rent were granted precisely as

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in the present case, without any mention of heirs, that no stranger could claim the enjoyment of it (*a*); but it is laid down by Lord *Coke*, and supported by other authorities, that both in annuities, and in any other thing that lieth in grant, there may be a *special occupant*. (*b*)

Now whether the expression *special occupant* is strictly proper, or is used by way of analogy only, as descriptive of the person, not who should occupy or enter upon, but who should receive or take rent, is immaterial; it is enough to say, the special occupant of rent was a legal phrase, known and in use long before and at the time the statute of frauds was passed. Even *Vaughan* C. J. when arguing that the rent determines on the death of the grantee, uses the expression, "That if rent be granted to a man and his heirs during another's life, the heirs shall have it, not as a special occupant (as the common expression is), but as a descendible freehold," thereby admitting the phrase of a special occupant of rent, to be one in common use and possessing a known meaning.

But the limitation or restriction in the statute, applies only to such estates whereof there could by law be a *special occupant*. "In case there be no special occupant thereof," says the statute, "then it shall go to the executors or administrators of the party who take the estate by the grant." The sounder construction of the second branch of the section, is, therefore, to make it include the grantees of rents, as such estates were held, in common parlance to be the subject of *special occupancy*; and this is, at the same time, more consonant to the construction of the whole section, which seems to require that the same subject matter as is made devisable, should also be made to vest in the personal represent-

(*a*) *Co. Lit.* 41 *b*. (*b*) *Co. Lit.* 388 *a*. *Moore*, 664. *Willes*, 505.

atives,

atives, if not devised, and if no special occupant is named in the original grant. And this interpretation of the act, if it can be drawn from the words, is evidently more consistent with the spirit and intention of the statute; for if it was inconvenient in the case of tenancy *pur autre vie* in land, that a stranger might enter and enjoy it upon the death of the tenant, living *cestui que vie*; it was equally inconvenient, that in case of a grant of rent, upon the death of the grantee, being *cestui que vie*, the tenant of the land should continue to hold it without paying the rent to any one.

We think, therefore, the present case is governed by the statute; and our opinion is confirmed by the decision of Lord Keeper *Harcourt*, in the case of *Rawlinson* v. *Duchess of Montague and Others* (*a*), and of Lord Chief Justice *Willes*, in *Willes' Rep.* 505.

With respect to the second objection taken in the argument as to the power of distress, it becomes unnecessary to consider it, as the terms of the grant continue that power during the life of *cestui que vie*.

On the whole we give judgment for the Defendants.

Judgment for Defendants.

(*a*) 3 *P. Wms.* 264 n.

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(IN THE EXCHEQUER CHAMBER.)

Nov. 27.

NEWBERRY and Another *v.* COLVIN and BENSON.

The owner of a ship, by an instrument called a charter-party, appointed *G. B.* to the command, and agreed that *G. B.* should be at liberty to receive on board a cargo of lawful goods, (reserving 100 tons to be laden for account of the owner), and proceed therewith to *Calcutta*, and there reload the ship with a cargo of *East India* produce, and return therewith to *London*; and upon her arrival there and discharge, the intended voyage and service should end; and the owner further agreed, that a complement of thirty-five men should, if possible, be kept up; that he would supply the ship with stores, and that she might be retained in the said service twelve months, or so much longer as was necessary to complete the voyage; in consideration of which *G. B.* agreed to take the command, and receive the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage, and pay to the owner for the use and hire of the ship after the the rate of 25*l.* per ton per month, of which 1000*l.* was to be paid on the execution of the charter-party. And it was further agreed that *G. B.* should remit all freight bills for the homeward cargo to *B. B.* and Co. in *London*, who should hold them as joint trustees for the owner and *G. B.*: that they should be applied to payment of the balance of freight due from *G. B.*, and the surplus, if any, be handed over to him. It was then provided, that the owner should have an agent on board, who was to have the sole management of the ship's stores, and power to displace *G. B.* for breach of any covenant in the charter-party, and appoint another commander. *C.* and Co., in *Calcutta*, having knowledge of this instrument, shipped goods on board the vessel for *London*, which were never delivered there: Held, that they could not recover against the owner.

CASE against *Newberry* and another, the Defendants below, as the owners of the ship *Benson*, for the loss of goods shipped by the Plaintiffs in *India* to be conveyed to *England*.

The first count of the declaration alleged, that the Defendants, before and on the 11th day of *March* 1817, were owners of the *Benson*, whereof one *George Betham* then was master, and which ship or vessel was then riding at anchor in parts beyond the seas, to wit, in the river *Hooghly* in the *East Indies*, and bound on a voyage from thence to the port of *London*; and that the Defendants so being owners of the ship or vessel as aforesaid,

aforesaid, the Plaintiffs on, &c. in the river *Hooghly* aforesaid, shipped and loaded, and caused to be shipped and loaded, in and on board of the said ship or vessel, whereof the said *George Betham* then was master, divers goods and merchandizes, to wit, 2171 bags of sugar, and 191 chests of indigo, of them the Plaintiffs, then being in good order and well conditioned, and of a large value, to wit, of the value of 20,000*l.* of lawful money of *Great Britain*, to be taken care of, and safely and securely carried and conveyed in and on board of the said ship or vessel from the river *Hooghly* aforesaid, to the port of *London* aforesaid, and there, to wit, at the port of *London* aforesaid, to be safely and securely delivered in the like good order and well conditioned, to certain persons commonly called and known by the name, and using the style and firm of Messrs. *Bazett, Farquhar, Crawford*, and Company, or to their assigns, (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, excepted,) for certain freight and reward, payable by bills in that behalf; and although the said goods and merchandizes were then and there had and received by the said *George Betham*, so being master of the said ship or vessel aforesaid, in and on board of the said ship or vessel in the river *Hooghly* aforesaid, to be carried, conveyed, and delivered as aforesaid, yet the Defendants, so being owners of the said ship or vessel as aforesaid, not regarding their duty as such owners, but neglecting the same, and contriving, and wrongfully and unjustly intending to injure the Plaintiffs in this behalf, did not, nor would, take care of, and safely or securely carry or convey the said goods or merchandizes, or cause the same to be carried and conveyed in or on board of the said ship or vessel, or otherwise, from the river *Hooghly* aforesaid,

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aforesaid, to the port of *London* aforesaid, nor there, to wit, at the port of *London* aforesaid, safely or securely deliver the same, or cause the same to be delivered to Messrs. *Bazett*, *Farquhar*, *Crawford*, and Company, or to their assigns, although the Defendants were not prevented from so doing by the act of God, the king's enemies, fire, or other dangers, or accidents of the seas, rivers, or navigation of any nature or kind soever; but on the contrary thereof, they, the Defendants, so being owners of the said ship or vessel aforesaid, so improperly behaved and conducted themselves, with respect to the said goods and merchandizes, that by and through the mere carelessness, negligence, misconduct, and default of the Defendants and their servants, in this behalf, a great part of the said goods and merchandizes being of great value, to wit, of the value of 10,000*l.* of the like lawful money, became and was wholly lost to the Plaintiffs; and, also, thereby the residue of the said goods and merchandizes, being of great value, to wit, of the value of 10,000*l.* of like lawful money, became and was greatly damaged, lessened in value, and spoiled, and the Plaintiffs lost and were deprived of divers great gains and profits, which might and would otherwise have arisen and accrued to them from the sale thereof, to wit, at *London* aforesaid.

The Defendants pleaded the general issue.

At the trial before Lord *Tenterden* C. J., at the *London* sittings after *Michaelmas* term 1826, a special verdict was found, in substance as follows: — On the 11th of *March* 1817, the Plaintiffs shipped on board the ship *Benson*, near *Calcutta*, in the *East Indies*, 2171 bags of sugar, and 191 chests of indigo, then being in good order, and well conditioned, for which the following bill of lading was signed by *George Betham*, then being the master of the said ship, under the

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the circumstances hereinafter mentioned: — "Shipped, by the grace of God, in good order and well conditioned, by Messrs. *Colvin, Bazett*, and Company, in and upon the good ship called the *Benson*, whereof is master, under God, for this present voyage, *George Betham*, now riding at anchor in the river *Hooghly*, and by God's grace bound for *London*, to say, 2171 bags of sugar, and 191 chests of indigo, being marked and numbered as in the margin; and are to be delivered in the like good order, and well conditioned, at the aforesaid port of *London*, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted, unto Messrs. *Bazett, Farquhar; Crawford*, and Company, or to their assigns; freight for the said goods being paid by bills."

G. Betham received the said goods on board the said ship in the river *Hooghly*, to be carried and conveyed according to the bill of lading. At the time of the said goods being so shipped and received, and the said bill of lading signed, and before that time, the Defendants were the owners of the said ship; and before the said ship sailed to the *East Indies*, and whilst they were such owners, the following charter-party, bearing date the 7th of *June* 1816, was executed by the Defendant *Thomas Starling Benson*, who was then the managing owner of the ship, and acting on behalf of himself and the other owner of the ship on the one part, and *G. Betham* of the other part, for the said ship *Benson*: —

"This charter-party of affreightment, made and concluded in *London* the 7th of *June* 1816, between *Thomas Starling Benson* of the city of *London*, part-owner of the good ship or vessel called the *Benson*, of 573 tons measurement, or thereabouts, now lying in the port of *London*, of the one part, and *George*

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Betham of the city of *London*, merchant and mariner, freighter of the said ship, of the other part, witnesseth, that the said owner, for the consideration hereinafter mentioned, doth hereby promise and agree to and with *George Betham*, his executors, administrators, and assigns, that he *G. Betham* shall have and he is hereby appointed to the command of the said ship, but with such restrictions as hereinafter mentioned, and subject to the proviso and condition hereinafter contained respecting the appointment of an agent on board the said ship on the part of the said owners: and the said ship being tight, staunch, and substantial, and every way properly fitted, victualled, and provided, as is usual for vessels in the merchants' service, and for the voyage and service hereinafter mentioned, and being also manned with thirty-five men and boys, the said commander included, the said *George Betham* shall be at liberty and he is hereby allowed and permitted to receive, take, and load on board the said ship in the port of *London*, all such lawful goods, wares, and merchandize as he may think proper to ship, not exceeding in the whole what the said ship can reasonably stow and carry over and above her stores, tackle, apparel, and provisions, and reserving sufficient room in the said ship for 100 tons of goods to be laden by or for account of the said owner as hereinafter is mentioned: and the said ship being so laden, *G. Betham* shall and will set sail therewith, and proceed to *Calcutta* in the *East Indies*, with liberty to touch at *Madeira* and *Madras* in her outward passage; and being arrived at *Calcutta* aforesaid, shall and will unload the said outward cargo, and reload the said ship with a cargo of *East India* produce, and return with the same to the port of *London*, and upon her arrival there, and being finally discharged of her cargo, and cleared by the revenue officers, the said intended voyage and service is to end and be com-

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completed; the act of God, the king's enemies, restraint of princes and rulers, fire, and all and every the dangers and accidents of the seas and navigation, of what nature or kind soever excepted: and the said owner doth hereby further promise and agree to and with *G. Betham*, his executors, administrators, and assigns, that in case any of the aforesaid complement of thirty-five men and boys shall happen to die, or desert, or leave the said ship during the said intended voyage and service, so that the number shall be reduced below thirty-two, that then and in every such event happening, the aforesaid number of thirty-two shall, if practicable, be kept and made up at the expence of the said owner: and further, that the said ship shall at all times during the said intended voyage and service, be furnished and provided with proper and sufficient stores, provisions, and other necessary articles, and that the said ship shall, if required, be kept and continued in the service aforesaid, for and during the term of twelve calendar months, to be accounted for from the 12th day of the present month of *June*, and for and during such longer time or term as may be necessary to complete her aforesaid voyage, and until her return to the port of *London*, being finally discharged of her homeward cargo, and cleared by the revenue officers: and the said owner doth also promise and agree, that the said ship shall, previous to her departure from the port of *London*, on her above-mentioned voyage, be furnished and provided with good water-casks, capable of containing eighteen tons of water; and the said owner doth also engage to provide the said ship with coals and wood for cooking and dressing the passengers' provisions, for which the said freighter is to pay or allow unto the said owner, at and after the rate of fourteen pence for every passenger or servant per lunar month, and so in proportion for a less period; in consideration whereof, and of every thing above

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mentioned, he, *G. Betham*, doth hereby promise and agree to and with the said *Thomas Starling Benson*, in manner and form following, that is to say, that he *G. Betham* shall and will take upon himself the command of the said ship, for and during her said intended voyage, and until her return to the port of *London*, and shall and will navigate her to the best and utmost of his skill and ability; and also, that he *G. Betham* shall and will accept, receive, and take the said ship into his service, for and during the term and space of twelve calendar months certain, to commence and be accounted from the 12th day of the present month of *June*, and for and during such longer time or term, if any, as may be necessary to complete the said voyage, and until her return to, and final clearance in the port of *London*: and further, that he shall and will well and truly pay, or cause to be paid unto the said owner, freight for the use and hire of the said ship, at and after the rate of 25*s.* per ton, register measurement of the said ship, per calendar month, for and during the aforesaid term of twelve calendar months certain, and for and during such longer time or term, if any, as may be necessary to complete her said intended voyage, and until her return to the port of *London*, and being finally discharged of her homeward cargo, and cleared by the revenue officers, or up to the day of her being lost, captured, or last seen or heard of; such freight to be paid in manner following, that is to say, the sum of 1000*l.* part thereof at or before the execution of these presents; the sum of 2000*l.* further part thereof by approved bill or bills, to be drawn in *London* upon *Calcutta*, in favour of the said owner, payable, as to one moiety thereof, at one calendar month, and as to the other moiety thereof at two calendar months next after the ship shall arrive at *Calcutta*; and the residue and remainder of such freight, to be paid or secured to the satisfaction of the said owner,

owner, upon the arrival of the ship in the port of *London*, and previous to commencing the discharge of her homeward cargo: Provided always, that in case the said ship shall be kept or detained at *Calcutta* aforesaid more than ninety days, then and in such case the said *G. Betham* doth hereby engage to pay or cause to be paid, at *Calcutta* aforesaid, to the agent of the said owner the sum of 1000*l.*, either in cash or by bills to be approved of by such agent in part payment of the balance of freight which may become due under and by virtue of this charter-party; and the further sum of 1000*l.* at the expiration of every sixty days, after the said ninety days, which the said ship may expend or lie at *Calcutta* aforesaid: and it is hereby declared and agreed by and between the said parties, that bills remitted from *India*, in manner hereinafter expressed, shall be deemed, taken, and considered as good and sufficient security for the payment of the residue or balance of freight which may become due under and by virtue of these presents as hereinbefore mentioned: and *G. Betham* doth hereby expressly promise and agree, that all and every the bills of exchange which may be taken in payment of the freight of the said ship's homeward cargo, shall be made payable to, or to the order of, Messrs. *Buckles*, *Baxter*, and *Buchanan*, of the city of *London*, merchants, or be indorsed over to them, and delivered to the owner's agent to be by him remitted to the said *Buckles*, *Baxter*, and *Buchanan*, in *London*, who, it is expressly agreed by and between the said parties, are to receive the amount thereof, as joint trustees for the said owner and *G. Betham*; he, *G. Betham*, authorising and empowering them to appropriate the proceeds of such bills of exchange in or towards payment to the owner of the balance of freight which may be or become due to him under and by virtue of these presents; and the residue, if any, to *G. Betham*: and *G. Betham* doth hereby further pro-

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mise and agree to furnish and provide, at his own expense, sufficient provisions and water, and also all other necessaries for the use of the passengers on board the said ship; and that he shall and will pay for all provisions belonging to the owners of the ship which shall be issued for the use of, or consumed by, any of the passengers or servants during the voyage, an account of the same being rendered to him once a week by the said owner's agent, or by the steward on board the ship: and farther, that all expenses of bulk heads, cabins, and other accommodation for passengers, shall be paid by him, *G. Betham*; the materials for which are to be left on board the ship at the termination of the voyage, and to become the property of the owner: and *G. Betham* doth also agree to pay and defray all port charges and pilotage which may be incurred by the ship during her intended voyage, save and except such as may be incurred in the port of *London*, outward and homeward bound, and once at *Calcutta*: and *G. Betham* doth hereby further agree, that the owner shall have the liberty of shipping on board the said ship outward bound, freight free, any quantity of iron, vinegar, and mustard he may think fit, not exceeding in the whole 100 tons, to be delivered at *Calcutta*: Provided always, and it is hereby expressly agreed and understood by and between the parties to these presents, and particularly by *G. Betham*, that an agent shall be put on board the ship by the owner for and during the whole of her aforesaid voyage and service, and who is to have a separate cabin in the said ship for his sole use, and to mess at the said *G. Betham*'s table; which agent is to have the sole management, direction, and superintendence of the ship's stores and provisions, and the issuing and delivering out of the same for and during the intended voyage; and such agent is likewise to have the sole ordering and purchasing of any supplies, stores, pro-

provisions, and other articles which may be required for the use of the ship during her voyage; and that all bills which may be required to be drawn upon the owners of the ship for any such supplies, or otherwise on account of the ship, shall be drawn by such agent only: Provided also, and it is hereby further agreed by and between the said parties, and especially by the owner, that the freighter shall have the liberty and privilege of employing the ship in the *East Indies* for any intermediate voyage or voyages he may think fit, without prejudice to this charter-party, but not exceeding in the whole the time or term of twelve months, to be computed from and after the expiration of thirty days next after the arrival of the ship at *Calcutta* aforesaid, upon *G. Betham* paying or causing to be paid to the owner the same rate of freight as is hereinbefore stipulated, viz. 25*s*. per ton per month, for all such additional time as the ship may be so employed or detained in *India*; such additional freight being paid to the owner's agent for the time being, or secured to his satisfaction, previous to the ship entering or proceeding on such additional voyage or service: and it is hereby expressly provided and declared, that in case *G. Betham* shall proceed with the said ship to any part or place, other than *Madeira*, *Madras*, and *Calcutta* aforesaid, without the special leave in writing of the agent of the owner for the time being, or if *G. Betham* shall be guilty of a breach of any or either of the promises and agreements herein contained on his part, then and in any such case he shall be and become divested of any further command of or in the ship, and it shall thereupon be lawful for the owner's agent for the time being to appoint another commander for the said ship in lieu and instead of the said *G. Betham*."

This charter-party was made and executed *bonâ fide*.

On the 25th *July* 1816, the following memorandum

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was signed and agreed to by the Defendant, *Thomas Starling Benson*, and the said *George Betham* :—"Conditions agreed between *Thomas Starling Benson*, Esq., owner, and *George Betham*, Esq., commander of the ship *Benson*, on a voyage to *India*. Wages, say 10*l*. per month. No primage or privilege of tonnage whatever. Cabin allowance for voyage (it being understood that the agent, chief, and second mates, and surgeon, if any, mess in cabin) 150*l*., owner providing nothing. Allowance while in *India*, three sicca rupees per day."

Samuel Oviatt went as agent on board the ship *Benson* under the charter-party, on the said voyage, and carried out letters of introduction from the persons using the said firm of *Buckles*, *Baxter*, and *Buchanan*, being merchants in *London*, on behalf of the said Defendants to the Plaintiffs, by which he was directed to apply to them in case of necessity, and he did apply to them, and they acted as agents at *Calcutta*, both for the said Defendants and *G. Betham*, as hereinafter mentioned. *Samuel Oviatt* acted under a power of attorney executed by the Defendant *Thomas Starling Benson*, which recited the charter-party, and then gave *Oviatt* authority to do on his behalf all things for which that instrument contemplated the appointment of an agent. *Samuel Oviatt* carried out with him the charter-party, and communicated it to the Plaintiffs as soon as he arrived at *Calcutta*, and before the shipping of the goods, and the Plaintiffs before that time read the charter-party and received a copy thereof; and for the freight of the said quantity of sugar and indigo in the bill of lading mentioned, the Plaintiffs drew bills upon certain other persons, payable sixty days after the ship *Benson's* arrival in *London*, to the order of *Buckles*, *Baxter*, and *Buchanan*; which bills they delivered to *S. Oviatt* to be remitted to the said last-mentioned persons, pursuant to the stipulation of the charter-party; and the

said

said bills were so remitted. *G. Betham* employed the Plaintiffs as his agents at *Calcutta*, who accordingly acted as his agents, and collected and paid over to him the freight of the goods carried in the ship on the voyage from *London* to *Calcutta*, and procured freight for him in the voyage from *Calcutta* to *London*; and they had a commission from him for procuring such freight.

The ship sailed on her voyage from the river *Hooghly* to *London* with the said quantities of sugar and indigo on board, but they were never delivered to the Plaintiffs, or their assigns, pursuant to the bill of lading, although no act of God, the king's enemies, fire, or any other dangers or accident of the seas, rivers, or navigation, of what nature or kind soever, prevented the same from being so delivered; but, on the contrary thereof, 1651 bags of the said sugar, and twelve chests of the said indigo, were wholly lost to the Plaintiffs, and the residue of the said sugar and indigo greatly lessened in value.

Judgment having been given for the Plaintiffs below, in the Court of King's Bench, the case was brought into this court by writ of error; and was now argued by

Campbell for the Defendants below. This action, although in form an action of *tort*, is in reality an action of contract. The cause of action as stated, accrues upon a breach of duty arising out of a contract, which is the foundation of this action. It was, therefore, essentially necessary for the Plaintiffs below to prove the contract as laid. So much is this an action of contract, that, according to *Powell* v. *Layton* (*a*), nonjoinder of a party as defendant might have been pleaded in abatement. How, then, is the contract

(*a*) 2 *N. R.* 365.

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laid in this case? The declaration, in a subdolous manner, states, that the goods were shipped to be taken care of, and safely and securely carried and conveyed, &c. for certain freight and reward, *payable by bills in that behalf*. That must mean, as it ought to have been expressly stated, payable by the Plaintiffs below to the Defendants below, otherwise a demurrer to the declaration might have been sustained, on the ground that no consideration was alleged, as moving from the Plaintiffs to the Defendants. But it would have been fatal to have alleged the contract with such precision, for the freight was not payable to the Defendants below, but to *Betham* the charterer. The Defendants below could claim nothing of the Plaintiffs below: they were to be paid the hire of their ship by *Betham* under the charter-party. There is nothing in the charter that could authorize the Plaintiffs to consider the Defendants as receivers of the freight and carriers of the goods. It is found that the Plaintiffs knew all the circumstances; that they read the charter-party, and received a copy, and that the charter-party was made *bonâ fide* between the parties. That instrument has a double purpose; it first appoints *Betham* master, and then charters the ship to him. There is nothing improper in that; an owner may be master, and why not a charterer, who is owner *pro hâc vice?* *Vallejo* v. *Wheeler* (*a*), *James* v. *Jones*. (*b*) If that be so, this is like all ordinary charter-parties. It is true that it does not contain express words of demise; but the Court will look at the whole of the instrument, and if it authorizes *Betham* to put up the ship as a general ship, it is a charter-party. In *Saville* v. *Campion* (*c*) and *Tate* v. *Meek* (*d*), there were no express words of demise, and it was held, the owner had a lien for his freight; but it was never doubted that

(*a*) *Cowp.* 143.
(*b*) *Abb. on Shipping*, 20.
(*c*) 2 *B. & A.* 503.
(*d*) 3 *B. & B.* 24.

the

the charterer might make what use of the vessel he pleased, for the period of time mentioned in the charter-party. Suppose the same stipulations as to letting this vessel had been entered into by the owner with a third person instead of the master, and that by the same instrument *Betham* had been appointed master; there could be no doubt that such third person must have been considered the freighter, and that shippers, with notice, could not have made the owners responsible for their goods. The circumstance of an agent for the owners being on board, can make no difference, for his duty was merely to look after the stores, and to take care that the covenants in the charter-party were performed. He had no authority whatever to interfere with the use of the ship. He was like the agent of a mine-owner, appointed to see covenants for working the mine duly performed by the lessee. There was no privity in this case between the owner and the shipper. If there had been a contract, it must have been reciprocal; but that was clearly not so. The owner could not have sued the shipper for freight, and, therefore, is not, on the ground of contract, responsible for the goods. The broad question, therefore, arises, Whether an owner is liable in an action founded on an implied contract, where the ship has been chartered to a third person? In *Boucher* v. *Lawson* (*a*), which may be cited on the other side, judgment was eventually given for the defendant. *Parish* v. *Crawford* (*b*), where it seems to have been thought the owner was liable to a shipper, notwithstanding a charter-party to a third person, was only a *Nisi Prius* case, and is in effect over-ruled by the more recent decisions of *James* v. *Jones* (*c*) and *M'Kenzie* v. *Rowe*. (*d*) In the latter case, it is true, the report states, that there was no evidence

(*a*) *Cas. Tem. Hardw.* 85. 194.
(*b*) *Abb. on Shipping*, 19.
(*c*) *Abb. on Shipping*, 20.
(*d*) 2 *Campb.* 482.

that

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that the goods were received on board by any person appointed by the defendants, the owners, but that can make no difference, where the shipper knows of the contract made between the owner and master. In *Abbott* on *Shipping*, p. 22., a doubt is expressed, whether *Parish* v. *Crawford* can be considered as law, there being, where the ship is chartered to a third person, no contract, either express or implied, between the owner of the ship and the proprietor of goods shipped. For the same reason the Plaintiffs below are not entitled to recover.

F. Pollock contrà. The effect of this instrument called a charter-party, was not to demise the ship to *Betham*, so as to enable him to put her up as a general ship, but was a special appointment of him as master. It does not contain any words of demise. The present case, therefore, does not fall within any of those which establish that where a ship is demised the charterer becomes owner *pro hâc vice.* The whole of the instrument may be construed as an appointment of *Betham* as master under special terms and restrictions. It begins by stating that "the owner, for the consideration hereinafter mentioned, doth hereby promise and agree to and with *G. Betham*, his executors, &c., that the said *G. B.* shall have, and he is hereby appointed to the command of the said ship, but with such restrictions as are hereinafter mentioned." That explains the whole of what follows. The agent on board had power to remove *Betham* from the command for breach of any of the covenants in the contract made between him and the owners. *Betham* then was master, and instead of contracting for any fixed wages, he guaranteed to his owners certain profits, and was to retain all the surplus, and third persons were to consider him merely as master, although they knew of the charter-party. Besides the Defendants

Defendants below expressly stipulate for a lien upon all freight bills; the bills were transmitted to their broker; and it would be singular if they could ensure to themselves all the benefit derived from carrying goods, and avoid the risk. In *Boucher* v. *Lawson*, Lord *Hardwicke* said, that owners are liable for the loss of goods on two grounds: first, that they appoint the master; and secondly, that they receive the freight. In that case, it is true, the second reason did not apply, and ultimately judgment was given for the defendant; but it is an express authority, that if a person be appointed and act as master, the owner is responsible for goods shipped on board the vessel, although there may be some special agreement between him and the master as to the mode in which the wages of the latter are to be paid and the freight received. The authority of the case of *Parish* v. *Crawford* may perhaps be doubtful; but that was a much stronger case than this in favour of the defendant; *James* v. *Jones* and *M'Kenzie* v. *Rowe* are distinguishable; in the former the owner had nothing to do with the freight, in the latter there was no evidence that the goods were received on board the vessel by any person appointed by the defendants.

Campbell. The freight bills belonged to *Betham*, and they were transmitted to the Defendant's brokers, not to give the Defendants any claim against the shippers, but as a security deposited by *Betham* for his paying the hire stipulated for by the charter-party on the voyage homewards. The brokers only held the bills as trustees, and for the voyage out there was no security. The decision in the Court below proceeded on a mistaken notion of public policy, which, as *Burrough* J. said in *Richardson* v. *Mellish* (*a*) "is a very unruly horse, and when

(*a*) 2 *Bingh.* 229.

once

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once you get astride it, you never know where it will carry you."

Cur. adv. vult.

TINDAL C. J. In this writ of error the sole question appears to be, whether, upon the legal construction of the charter-party set out at length in the special verdict, the Defendants below were the owners of the vessel called the *Benson*, at the time the contract for the carriage and conveyance of the goods in question was made; or, whether, on the contrary, *Betham*, the captain and freighter of the vessel, became, *pro tempore*, the owner thereof:

For the present action, although in form an action upon a tort, is virtually and substantially an action upon the contract contained in the bills of lading, and set out in the declaration. To decide therefore, whether the action is rightly brought, it must be ascertained with whom the contract was made; whether with the Defendants below, as the owners of the vessel, through *Betham*, as their master or agent, or with *Betham* himself, as the freighter and owner *pro hac vice*, for his own benefit, and on his own behalf.

Now the special verdict has found two things: first, that this charter-party was entered into *bonâ fide;* by which we understand that there was no secret or sinister design in framing this charter-party to leave the ship-owners in the dominion of their ship, and the enjoyment of the profits, and at the same time to exempt them from responsibility to the shippers of goods, but that the real object of the owners and the freighters was such as is to be collected from the charter-party itself, and such only. The other fact found by the jury is, " that the charter-party was communicated to the Plaintiffs before the shipping of the goods, and that the Plaintiffs before that time read the charter-party, and received a copy thereof,"

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thereof," which latter finding negatives any inference that would otherwise arise, that *Betham*, by reason of his command of the vessel, was held out by the Defendants to the Plaintiffs below as their agent in the conduct and management of the ship, as they knew the real situation and relative rights of the captain and the owners before they put their goods on board to be carried on that voyage. The question to be considered, therefore, is simply that of the construction of the charter-party; and we think upon the whole instrument taken together, the construction is such as to constitute *Betham* as between him and the shippers of goods, the owner of the ship during the continuance of the voyage described in the charter-party.

In the first place, by the terms of the charter-party, the owners covenant "that the ship shall, if required, be kept and continued in *the service* described therein, during the term of twelve calendar months, and such longer time as may be necessary to complete the voyage." And *Betham*, on the other hand, covenants "to accept, receive, and take the ship into *his service* for the term of twelve calendar months certain, until the voyage shall be ended, and to pay to the owner for the *use or hire* of the said ship at and after the rate of 25*s.* per ton per calendar month, during the said term of twelve calendar months certain, and until her return to the port of *London* and clearance, or up to the day of her being lost, captured, or last seen or heard of."

But it is objected by the Plaintiffs below, that such contract contains no words of express demise: and undoubtedly it does not. But even in a lease of lands, no such words are absolutely necessary, "but any words which amount to a grant are sufficient for a lease." (*a*) And there are cases in the books that if a

(*a*) *Co. Lit.* 45 *b.*

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man covenants that *A.* shall have the land for a term, rendering rent, or that the covenantee shall enjoy the land (*a*), these words would amount to a lease.

Now the present case comes very near those referred to; for the owners do covenant that the ship shall be kept in the *service* of *Betham* for a certain time; *Betham* covenants that he will receive her into his service during that time; and that he will pay for *the use or hire* of her a certain freight: stipulations that appear equivalent in their effect to an actual demise of the ship.

But further, the whole of the ship is so far parted with that it is thought necessary that *Betham* should covenant with the owners that they should have liberty to load, on the outward voyage, iron and other articles, not exceeding in the whole 100 tons.

Again, the mode in which the ship was to be used, and in which the freight reserved by the charter-party is to be paid, support the same construction of the charter-party. The ship, both on her outward and her homeward voyage, was to be put up by *Betham* (in many parts of the charter called *the freighter*) as a general carrying ship. The freight which the owners stipulate to receive from him is quite independent of that which he receives for the carriage of goods. Theirs is a time freight; his depends on the carriage of the goods shipped. If the ship went out without any cargo, or was lost before her arrival at her outward or homeward port of destination, in all which cases *Betham* might receive no freight, the owner would still receive the same amount as if she had returned full, or, in case of loss of the ship, up to the day of her loss. Under these circumstances, we think the captain, in putting up the ship as a general ship, and signing bills of lading, cannot be considered as acting as the servant or agent

(*a*) 1 *Leon*, 136.

of

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of the shipowners, or in any other manner than as the temporary owner of the ship.

Three objections have been principally relied on in argument by the Defendants in error: first, that the same person who takes the ship as freighter, was himself appointed as the captain by the owners of the ship; secondly, that an agent was put on board by the owners with powers inconsistent with *Betham*'s ownership of the vessel *pro tempore*; and, thirdly, that the owners virtually receive the benefit of the homeward freight, by the transmission of the freight bills to *England*.

But, with respect to the first objection, it is almost the invariable practice and usage, that the owners of a ship, although they let it out upon freight to a charterer, do themselves appoint a captain and the crew: the chartering of the ship not being so much the chartering of the hull, as of the ship in a state fit for the purposes of mercantile adventure. There seems no reason, therefore, that the chartering of the ship in any particular case to the captain of that ship, should create any more responsibility in the owner to the shippers of goods, where such fact is made known to them, than if the ship were freighted to an entire stranger.

The second objection is answered by reference to the charter-party; by which it appears that the authority of the agent was limited to the superintendence of the acts of *Betham* as captain, and not as freighter: the utmost authority given to the agent being that of displacing the master and appointing another, in case *Betham* should be guilty of a breach of any of the covenants or agreements on his part. But if *Betham* ceased to be master, he did nevertheless, by the terms of the charter-party, continue the freighter of the ship; possessing the same power to take goods on board, and liable to the same responsibilities, on the one hand, to the owners for the time freight for which he had contracted, on the

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other hand, to the shippers of goods for the safe conveyance of the goods shipped.

As to the third objection, the charter-party gives the owners a *security* upon the freight bills received by the freighter, but gives the owners no direct or immediate interest in the freight earned, the whole of the surplus of which belongs to *Betham*. If *Betham* had obtained no homeward cargo from *Calcutta*, so that no freight bills could have been transmitted, the owners would still have been entitled to their time freight. The freight earned by *Betham* on the intermediate voyage for twelve months in *India*, does not become a security to the owners. Even in the homeward voyage, if the ship had been lost, there might have been no freight payable to the freighter, but still he must have made good his own liability to a monthly freight for the use and hire of the vessel.

Upon the whole, therefore, we think the effect of this charter-party was to make the freighter the legal owner of this ship *pro tempore*; that the freight for the carriage of these goods was paid to him for his own use; and, consequently, that the Defendants below are not liable to an action for the non-delivery of the goods. We think, therefore, the judgment of the Court of King's Bench must be reversed.

Judgment reversed.

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Nov. 24.

SLANDER.

The words stated in the declaration to have been spoken by the Defendant of the Plaintiff, were, "He is a rogue and a swindler; I know enough about him to hang him:" and the Plaintiff then alleged, as a special damage, that by means of the committing of the several grievances, one *John Bryer*, who before and at the time of the committing of those grievances was about to sell goods to the Plaintiff on credit, necessary for the carrying on and commencing of the Plaintiff's business as a general shopkeeper, which he was about to commence, refused and declined so to do.

The Plaintiff alleged special damage from words spoken by the Defendant: Held, that this allegation could not be supported by proof that Defendant had spoken the words to *B.*, and that damage ensued in consequence of *B.*'s repeating them as the words of the Defendant.

The Defendant pleaded the general issue. At the trial of the cause, the evidence which the Plaintiff was prepared to produce was, that the Defendant had spoken the words as laid in the declaration, to one *Edward Bryce*, and that *Bryce* had communicated the statement as the statement of the Defendant to *John Bryer*, who thereupon refused to trust the Plaintiff. Upon this statement of the evidence, the learned Judge, who tried the cause, directed the Plaintiff to be called.

Bompas Serjt. in *Easter* term last obtained a rule *nisi* for a new trial, on the ground that the Defendant was responsible for the consequences of his own act, and it was a natural consequence that *Bryce* should repeat what was communicated to him; and that the Plaintiff would be without remedy unless he could sustain this action, for if *Bryce* named the author of the slander he was not liable. Lord *Northampton*'s case. (*a*)

(*a*) 12 *Rep.* 134.

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Wilde Serjt. shewed cause. The special damage which the Plaintiff proposed to shew, resulted, not from the statement made by the Defendant, as alleged in the declaration, but from a statement made by *Bryce*. The intended evidence, therefore, by no means sustained the statement in the declaration, and the Plaintiff was properly nonsuited for the variance.

But in order to support the action, it ought to have been shewn that the special damage resulted wholly and directly from the conduct of the Defendant. A man is liable only for the natural and proximate consequence of his actions, and not for remote consequences resulting directly from some intermediate agent. *Davis* v. *Garrett*. (*a*) As to the Plaintiff's having no other remedy because *Bryce* named his author, the rule to that effect in Lord *Northampton*'s case, has been repeatedly impeached, and at last expressly overruled in *M'Pherson* v. *Daniels*. (*b*) (See all the authorities on the point in *De Crespigny* v. *Wellesley*. (*c*) In *Vicars* v. *Wilcocks* (*d*) it was expressly held, that where special damage was necessary to sustain an action for slander, it was not sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the Plaintiff from his employ before the end of the term for which he had contracted; but the special damage must be a legal and natural consequence of the slander.

Stephen Serjt., and *Bompas contrà*.

Bryce was only the conduit pipe of the slander; and therefore the special damage which the Plaintiff alleges is the natural and proximate consequence of the Defendant's conduct. *Vicars* v. *Wilcocks* only decides that a Defendant is not liable for matters altogether extra-

(*a*) 6 *Bingh.* 716.
(*b*) 10 *B.* & *C.* 263.
(*c*) 5 *Bingh.* 392.
(*d*) 8 *East*, 1.

neous

neous to his own conduct; but if the Defendant is not liable for an effect produced by the very words he has uttered, a recipe is given for propagating slander with impunity. The Defendant has only to convey his charges by a third person to the party who is likely to act on them to the injury of the plaintiff, and may by that course effect the injury with impunity: and if his agent be insolvent, or escape, the Plaintiff is without remedy. The rule in Lord *Northampton's* case, therefore, ought not to be lightly impeached, and its authority was admitted in *Davis* v. *Lewis* (*a*) And if a Defendant could be responsible for actionable words, repeated by an agent, so he must be in principle for special damage, arising under the same circumstances, out of words nct actionable. The case is analogous to the first mover in trespass; *A.*, who throws the stone is liable, not *B.*, who by warding it off, causes it to strike *C.*; and it would be correct pleading to describe the blow on *C.* as a blow struck by *A.* In an indictment for murder by several, it is not necessary to state which of them struck the blow. There is no variance, therefore, in this case, between the declaration and the evidence proposed to support it. There is no precedent of a declaration in slander stating intermediate communications; and such an allegation would be bad, for the damage must be ascribed to the Defendant, and if so, the cause of it also. In *Hartley* v. *Herring* (*b*), and *Moore* v. *Meagher* (*c*), the declaration did not state in whose presence the words were spoken; and formerly it was not usual to set out the precise instance of special damage. *Browning* v. *Neawan.* (*d*) The only reason on which it has been supposed that the propagator of slander is excused when he names the author, is, that

(*a*) 7 *T. R.* 17.
(*b*) 8 *T. R.* 130.
(*c*) 1 *Taunt.* 39.
(*d*) 1 *Str.* 665.

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thereby the plaintiff is enabled to sue the author. The right to sue the author is recognized in all the cases. *Maitland* v. *Goldeyn* (*a*), *Lewis* v. *Walter*. (*b*) The principle laid down in *Dixon* v. *Bell* (*c*), is that where a person intrusts a gun to an incautious agent, he is bound to render it perfectly innoxious.

Cur. adv. vult.

TINDAL C. J. This was an action upon the case, in which the words stated in the declaration to have been spoken by the Defendant of the Plaintiff are, "*He is a rogue and a swindler: I know enough about him to hang him:*" and the Plaintiff then alleges, as a special damage, that by means of the committing of the several grievances, one *John Bryer*, who before and at the time of the committing of those grievances, was about to sell goods to the Plaintiff on credit, necessary for the carrying on and commencing of the Plaintiff's business as a general shopkeeper, which he was about to commence, refused and declined so to do.

The Defendant pleaded the general issue.

At the trial of the cause, the evidence which the Plaintiff was prepared to produce was, that the Defendant had spoken the words as laid in the declaration, to one *Edward Bryce*, and that *Bryce* had communicated the statement, as the statement of the Defendant, to *John Bryer*, who thereupon refused to trust the Plaintiff.

Upon this statement of the evidence, the learned Judge who tried the cause directed the Plaintiff to be called; and the question before us is, whether this nonsuit should be set aside?

As the words spoken do not contain the charge of any legal definite crime, nor are alleged to be spoken of

(*a*) 2 *East*, 425.
(*b*) 4 *B. & A.* 560.
(*c*) 1 *Stark. N. P. C.* 287.

the

the Plaintiff in the way of any trade or business, so as to impute dishonesty to him in such trade, the words are not actionable *per se*; and the only ground of action is the special damage which the Plaintiff has alleged. The question therefore is, Whether the special damage, which is the gist of the action, has been proved as it is alleged, or whether there is a variance between the allegation and the proof?

The substance of the Plaintiff's allegation is, that by reason of the Defendant's false representations to divers persons, one *John Bryer* refused to trust the Plaintiff. Now the evidence necessary to support this allegation would have been, either that *John Bryer* was present and heard the Defendant make the representation to some person, or, at the very least, that when the Defendant made such representations he directed them to be communicated to *Bryer*. But neither of these suppositions exist in fact; on the contrary, the evidence was, that the words were addressed to one *Edward Bryce*, and that *Bryce*, at a subsequent time and place, and without any authority from the Defendant, repeated the representation to *Bryer*, the repetition of which words, and not the original statement, occasioned the Plaintiff's damage.

Every man must be taken to be answerable for the necessary consequences of his own wrongful acts: but such a spontaneous and unauthorized communication cannot be considered as the necessary consequence of the original uttering of the words. For no effect whatever followed from the first speaking of the words to *Bryce*; if he had kept them to himself *Bryer* would still have trusted the Plaintiff. It was the repetition of them by *Bryce* to *Bryer*, which was the voluntary act of a free agent, over whom the Defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the Plaintiff's damage.

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We think therefore that as each count in the declaration alleges, as the only grievance, the original false speaking of the words, the allegation, "that by reason of the committing of such grievance, *Bryer* refused to give the Plaintiff credit," is not made out by the evidence; and on this ground we think the nonsuit is right.

It is argued, that unless the Plaintiff can recover against the present Defendant, he sustains a great injury, and is altogether without remedy; and the authority in the fourth resolution in Lord *Northampton's* case (*a*) is relied upon for that purpose. But even supposing the proposition laid down in that case is to be taken as an unqualified proposition that the repetition of slanderous words, stating at the time the name of the author, is upon all occasions, and under all circumstances, justifiable, which we agree in thinking is far from the import of the resolution, still we must look to the interests of the Defendant as well as those of the Plaintiff, and be careful not to make him responsible for a greater measure of damage than flows necessarily from his wrongful acts.

But the resolution above referred to, which has at all times been looked at with disapprobation, has in the recent case of *M'Pherson* v. *Daniels* (*b*), been in effect over-ruled by the Court of King's Bench; and with the judgment of that Court, upon that occasion, we entirely concur.

We therefore think the rule for setting aside the nonsuit must be discharged.

Rule discharged.

(*a*) 12 *Co.* 134. (*b*) 10 *B.* & *C.* 263.

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BAGNALL and Another *v.* ANDREWS.

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W. drew a bill on the Defendant, to whom he had been sending goods for sale, and Defendant accepted the bill, neither party knowing the state of the account between them: it turned out that *W.* was at the time indebted to the Defendant.

W. lurking from his creditors at large, after an act of bankruptcy, indorsed the bill, upon importunity, to Plaintiff, one of his creditors with whom he was on friendly terms, and then became a bankrupt.

Plaintiff having sued Defendant on the bill, Held,

That *W.* was an admissible witness in the cause, and the jury having found for the Defendant, the Court refused to disturb the

THE Plaintiffs sued the Defendant upon his acceptance of a bill of exchange drawn by *Woodbridge*, who before this action had become a bankrupt.

At the trial before *Tindal* C. J. it appeared, that when the bill was drawn, *Woodbridge* had an open account with the Defendant for goods which he was in the course of sending to him for sale: neither of them at that time knew the state of the account, and it afterwards turned out that *Woodbridge* was at the time of the acceptance indebted to the Defendant, instead of the Defendant being indebted to *Woodbridge*.

Before the bill became due, *Woodbridge* had fallen into insolvent circumstances; he absconded from his general creditors; lurked about *London* for three weeks under two fictitious names; frequently changed his abode, and expected to be arrested, and to have a docket struck against him: during this time, however, he frequently saw and dined with one of the Plaintiffs, to whom he was indebted to a larger amount than the bill, and upon being urged for payment, indorsed to him, after an act of bankruptcy, the bill accepted by the Defendant, the only property he then retained. The Plaintiff, however, was not aware that an act of bankruptcy had been committed. A commission of bankruptcy was afterwards sued out against *Woodbridge*, and he was duly declared a bankrupt.

Having been called as a witness at the trial, on the part of the Defendant, his testimony was objected to on the ground that this was an accommodation bill, and that he was under an express or implied obligation to pay the Defendants not only the amount of the bill if the Plaintiffs recovered, but the costs of the present action also. His testimony, however, was admitted, subject

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ject to a motion on the point; and the jury having found for the Defendant, upon the Chief Jnstice's leaving it them to consider whether the transfer of the bill to the Plaintiffs was under all the circumstances a *bonâ fide* transfer,

Taddy Serjt. moved for a new trial, on the ground that *Woodbridge*'s testimony ought to have been excluded; that the transfer of the bill to the Plaintiffs was protected as a payment under the eighty-second section of 6 *G.* 4. *c.* 16.; and that the jury could only have found for the Defendant, on the supposition that the transfer of the bill was a fraudulent preference, a point which they had not been directed to consider.

A rule *nisi* having been granted,

Wilde Serjt. shewed cause. The bill in question was drawn with a reasonable expectation that it would be paid by the acceptor: it was never stipulated or intended that it should be paid by *Woodbridge;* and if he had been sued in default of the acceptor, he must have had notice of the default, which would not have been necessary in the case of an accommodation bill: there is no ground therefore for considering it as an accommodation bill, for subsequent discoveries do not alter the nature of the bill; and as a drawer is not liable for the costs of a groundless defence by the acceptor, the witness had not the interest imputed to him, and his testimony was properly received.

Nor was the transfer of the bill to the Plaintiff by *Woodbridge* a payment protected by the eighty-second section of 6 *G.* 4. *c.* 16., for that section protects only *bonâ fide* payments, and not payments made by way of fraudulent preference, or in actual contemplation of bankruptcy. That this transfer was made in contemplation of bankruptcy is manifest from all the circumstances of the

the case, and the fact of the creditor's being urgent for payment will not excuse the preference, unless the debtor pays under legal compulsion. *Thornton* v. *Hargreaves.*(*a*)

Although the precise question of fraudulent preference was not put in terms to the jury, it was implied in the direction they received, and the verdict is justified by the fact that no consideration was ever given for the bill: (*De La Chaumette* v. *Bank of England* (*b*)): none by *Woodbridge* to the acceptor, for the bill was accepted under a mistake as to the state of the account between them; none by the Plaintiffs to *Woodbridge*, for they took it only in the nature of a security for a previous debt, from which, on the receipt of the bill, they neither discharged him, nor gave him longer term of payment.

Taddy. As the account stood between *Woodbridge* and the Defendant, *Woodbridge* could never have recovered on this bill against the Defendant, so that whether it were an accommodation bill or not, no interest in it passed to *Woodbridge*'s assignees, for they could only stand in the same situation as *Woodbridge* himself. *Woodbridge*, therefore, might lawfully indorse it to the Plaintiffs, for a bankrupt may indorse bills in which no interest passes to his assignees. *Willis* v. *Freeman* (*c*), *Wilkins* v. *Casey* (*d*), *Arden* v. *Watkins* (*e*), *Drayton* v. *Dale* (*g*), *Wallace* v. *Hardacre.* (*h*) But if he might indorse the bill over for value, and so render the acceptor liable to the indorsee, he, the drawer, must ultimately have been liable over to the acceptor, as having given no value for the bill: he was interested, therefore, in the result of this cause, and ought not to have been received as a witness.

(*a*) 7 *East*, 544.
(*b*) 9 *B.* & *C.* 208. *Hobson* v. *Rich*, and *Savage* v. *Rich* (not reported) were also referred to.
(*c*) 12 *East*, 656.
(*d*) 7 *T. R.* 711.
(*e*) 3 *East*, 327.
(*g*) 2 *B.* & *C.* 293.
(*h*) 1 *Campb.* 45.

Then,

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Then, the jury not having found fraud, this was a good payment under the eighty-second section 6 G. 4. The bill was available in the hands of the Plaintiffs, and that payment may be by a bill is clear from *Wilkins* v. *Casey*. In *Cash* v. *Young* (*a*), where *A.* bought goods of a trader who had previously committed an act of bankruptcy, and paid for them *bonâ fide* without knowledge of the bankruptcy, it was held, that the assignees, under a commission issued against the seller, could not maintain trover for the goods, payment being protected by the 1 *Jac.* 1. *c.* 15. *s.* 14. So in *Hill* v. *Farnell* (*b*), *A.* purchased of *B.*, a hop-merchant, a library, and paid him the value. *B.*, at that time, had committed an act of bankruptcy, of which *A.* had no knowledge. It was holden, that the assignees could not recover the value of the books, without at least tendering the price, inasmuch as the payment made by *A.* was declared valid by the 6 G. 4. *c.* 16. *s.* 82., and in order to give full effect to that enactment, *A.* must, at least, have a lien on the books in respect of which he had made the payment, until the assignees tendered him the sum paid.

And there is no ground for saying that the Plaintiffs gave no consideration for the bill: the debt due to them from *Woodbridge* to a greater amount than the bill, was a sufficient consideration. In *Drayton* v. *Dale* (*c*), which was an action of *assumpsit* by the indorsee against the maker of a promissory note, payable to *A. B.*, or his order; plea, first, *non assumpsit*; and, secondly, that *A. B.* became a bankrupt, and that his property was duly assigned to assignees, whereby the interest, title, and right to indorse the promissory note before the time of indorsement became vested in the assignees, whereby the indorsement by *A. B.* was void, and created no

(*a*) 2 *B.* & *C.* 413. (*b*) 9 *B.* & *C.* 45. (*c*) 2 *B.* & *C.* 293.

right

right in the Plaintiffs to sue; replication to the last plea, that the indorsement was made with the consent of the assignees; rejoinder, taking issue upon that fact; a verdict having been found for the Plaintiff on the first issue, and for the Defendant on the second, it was held that the Plaintiff was entitled to judgment upon the whole record: first, because the Defendant who had made the note payable to *A. B.* or his order, was estopped from saying that *A. B.* was not competent to make an order; secondly, because the property acquired by a bankrupt, subsequently to his bankruptcy, does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons. And in *Charles* v. *Marsden* (*a*), it was held, that it was not of itself a defence to an action by the indorsee of a bill of exchange, to plead that it was accepted for the accommodation of the drawer, without consideration, and was indorsed over after it became due. *De La Chaumette* v. *The Bank of England*, was the case of a stolen bank note, in which no property passed by the transfer, and is therefore distinguishable.

Cur. adv. vult.

TINDAL C. J. In this case the jury have found their verdict for the Defendant, and the motion for setting aside that verdict and granting a new trial has been made on two grounds; first, that *Woodbridge*, the drawer of the bill, was inadmissible as a witness for the Defendants; and, secondly, upon the ground that, on the evidence at the trial, the delivery of the bill to the Plaintiffs was protected as a payment made to them under the eighty-second section of the late bankrupt act.

The objection made to *Woodbridge*'s competency at the trial, was, that the bill had been accepted by the

(*a*) 1 *Taunt.* 224.

Defendant

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Defendant for the accommodation of the drawer; and, consequently, that he was under an obligation to them, either express or implied, not only to pay the amount to the Defendant, if the Plaintiffs obtained a verdict, but also to indemnify the Defendant against the costs of the present action. And it might be granted that this consequence would have followed, and that *Woodbridge* would have been an incompetent witness for the Defendant, on the authority of the cases referred to, if in point of fact the bill had been accepted for the accommodation of the drawer. But we think upon the facts of the case the bill was not an accommodation bill. At the time it was drawn, *Woodbridge* had an open account with the Defendants for goods already sent, and which he was then in the course of sending to them, for sale. The drawer might, at that time, reasonably expect that the acceptor would pay the bill out of funds that might be in their hands when the bill arrived at maturity; for the evidence is express, that at the time the bill was drawn, neither the drawer nor the acceptor knew the state of the account.

A bill so drawn and so accepted cannot be treated as an accommodation bill; nor consequently is there any implied undertaking, on the part of the drawer, to indemnify the acceptor against the costs of any action which may be brought against him.

With respect to the second ground of motion, the only question is, whether, upon the evidence given at the trial, the Court see any reason to disturb the verdict. The jury found a verdict for the Defendant, at the same time stating expressly that the bill had been indorsed after an act of bankruptcy by the drawer, of which the Plaintiffs had no notice. If the jury still found their verdict for the Defendant, it could only have proceeded on the ground that the delivery of the bill to the Plaintiffs by the bankrupt, either was not a

bonâ

bonâ fide payment to them, or was a fraudulent preference of the Plaintiffs; in either of which cases the payment is not protected by the statute. And though this precise point was not specifically left to the jury, it was involved in the evidence in the cause, and could be the only ground on which the verdict rests. Before, therefore, the Court send the case down to a new jury, they must see reason to expect that another jury would come to a different conclusion. That the bankrupt, before and at the time he delivered this bill to the Plaintiffs, was absconding from his general creditors, is clear. He had been in *London* for nearly three weeks, passing under two fictitious names; frequently changing his place of abode; expecting to be arrested, and to have a docket struck against him. But although concealing himself from other creditors, he was dining with one of the Plaintiffs; he delivered him the bill in question. That bill was all that he had at that time; and the delivery of that bill freed him from no difficulty in which he was placed.

It appears to us, that if it should be left to another jury to say whether this was a *bonâ fide* payment to the Plaintiffs, they could not but find the same verdict. The payment of the bill being made *after* the act of bankruptcy, the burthen of shewing it was a *bonâ fide* payment is cast upon the Plaintiffs; and it would be enough to support the verdict, to say that they have at least left it in considerable doubt.

The ground on which we decide, makes it unnecessary to give any opinion as to the question of sufficiency of consideration in this case. On the whole, we think the rule for a new trial must be discharged.

Rule discharged.

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Nov. 29.

BREACH *v.* CASTERTON and Three Others.

The Court will not grant a new trial even on payment of costs, where the Defendant or his attorney having an opportunity of trying, permits a verdict to be taken against him as in an undefended cause.

TRESPASS. The cause was undefended, and a verdict having been found for the Plaintiff against one of the Defendants, and a verdict in favour of the other three,

Taddy Serjt. obtained a rule *nisi* for a new trial, on payment of costs, upon an affidavit that the Defendant's attorney had been compelled to go to *Ireland*, and that in his absence, the cause had, through the inattention and misconduct of his clerk, been called on as an undefended cause, although there was a good defence on the merits.

Wilde Serjt., who shewed cause, objected that before the motion could be made, the consent of the three Defendants in whose favour the verdict had been given, ought to be shewn; and that they ought not to be put to the inconvenience of a new trial on account of the attorney's neglect.

Per Curiam. If we were to make this rule absolute, every cause might be tried twice over, as Defendants would lie by to speculate on the amount of the first verdict. We have this term decided against such an application, in *Masters* v. *Barnwell.* (*a*)

Rule discharged.

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(*a*) MASTERS *v.* BARNWELL.

Where a Defendant omitted to appear at the trial in an action for *crim. con.* with his sister-in-law, and the jury gave more damages than were laid in the declaration, the Defendant assigning no good reason for not appearing to defend, the Court refused to grant a new trial on any terms.

This was an action for damages for criminal conversation with the Plaintiff's wife. It appeared the Plaintiff and Defendant were brothers in law. The damages were laid in the declaration at 3000*l.*

The cause came on for trial at the sittings after *Trinity* term last, when no one appearing for the Defendant, the jury returned a verdict for the Plaintiff, and assessed the damages at 4000*l.*

Merewether

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Merewether Serjt. on a former day, obtained a rule to shew cause why the verdict taken for the Plaintiff should not be set aside and a new trial be granted, on the ground that the Defendant had been prevented, by the Plaintiff's conduct, from properly instructing an attorney to defend the action.

The affidavits on which the rule was obtained, set forth a number of instances of violence on the part of the Plaintiff. It was alleged that he followed the Defendant from *England* to *France*, from *France* back again to *England*, thence to *Brussels*; that in the latter place (the Defendant and the Plaintiff's wife living there together) the Plaintiff instituted criminal proceedings against the Defendant for the adultery; that the Defendant had been sentenced to six months' imprisonment; that he had been repeatedly challenged to fight the Plaintiff; and that by these, and by a variety of other proceedings of the same sort, by which he was kept in fear of his life, he had been prevented from giving proper instructions to his attorney; and that if he had not been so prevented, he should have been able to present to the jury a case that would at least have reduced in a material degree the amount of the damages.

Wilde Serjt. now shewed cause against the rule, on affidavits, which alleged, that the Plaintiff's attorney about the month of *January* last year, had received instructions from his client to commence the present action; that he had done so accordingly, but found that it was quite impossible to discover the Defendant in order to serve him with process. At last the attorney was informed that boxes belonging to the Defendant, (who was a *West India* planter,) were lying at a warehouse in the city for the purpose of being shipped on board a vessel that was about to sail for *Demerara*, in which island the Defendant's property was situated: he went to the warehouse in question, and after some trouble traced the Defendant to a house in *Arundel Street*, where he arrested him at the suit of a third person for a very large debt. Upon this arrest the Defendant lay some short time in prison, and during that period might have had daily communication with his attorney. In the course of the proceedings the Defendant himself on one occasion saw the Plaintiff's attorney, and admitted that he had no defence to the action, and must let the verdict pass against him. It was stated also, that the imprisonment at *Brussels*, of which the Defendant spoke, had been decreed after the verdict given in this country, so that that imprisonment could not have prevented the Defendant from giving proper instructions to his attorney. Besides that, when in this country the Defendant might had recourse to legal measures for his personal protection; and even if he had been afraid to venture out, he might have received the visits of his attorney at home, not only at the time when he was imprisoned for debt, but at a variety of other periods between that time and the day of the trial.

Merewether in reply, insisted much upon the amount of the damages, exceeding even the sum

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which the Plaintiff claimed by his declaration, and the hardship of the Defendant's being saddled with such a payment without any kind of investigation. But

THE COURT observing that it was plain the Defendant had ample time to consult with his attorney while he was confined in prison; that the charge against him was of the most aggravated nature; and that it would lead to the worst results if a party could lie by, take the chance of a judgment by default, and then demand a trial in the hopes of better success,

Discharged the rule.

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CARNE, and MARY, his Wife, *v.* GEORGE ROCH, the Younger.

Testator devised real property to the heir of Mrs. *R.* of *B.*, (who was living at his death,) and in case such heir should die without issue, to the next heir of Mrs. *R.*:

Held, that Mrs. *R.*'s eldest son took an estate tail in the property.

BY order of the Vice-Chancellor, the following case was submitted for the opinion of this Court.

John Thomas, late of *Brawdy*, in the county of *Pembroke*, Esq., was, at the time of making his will hereinafter stated, and at his death, seised of freehold estates in the county of *Pembroke*.

The said *John Thomas* made his will, executed and attested as is by law required to pass freehold estates by devise, and bearing date the 27th of *March* 1823, in the words following: —

"This is the last will and testament of me *John Thomas*, of *Eweston*, in the parish of *Brawdy*, in the county of *Pembroke*. I direct that all my just debts, and particularly a list or memorandum of debts signed *John Thomas*, to this my last will annexed, which said debts I expected the late Mr. *Herbert Lloyd* had long since paid, and all my funeral expenses, and the charges of the probate of this my will, be in the first place fully paid and satisfied, and to the payment whereof, and of the legacies hereinafter bequeathed, I subject and make liable all my estate, both real and personal: I give, devise, and bequeath all my real and personal

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personal estate of every description which I die possessed of unto the heir at law of Mrs. *Roch* of *Butterhill*, in the county of *Pembroke*, formerly Miss *Mary Jones* of *Llethir*; and in case such heir at law should die without issue, then I give and devise the same to the next heir at law of the said Mrs. *Roch*, and his or her issue; and in case all the children of the said Mrs. *Roch* should die without issue, then I give, devise, and bequeath all my said real and personal estate of every description unto *David Williams*, Esq., late a surgeon in the army, and living, or lately living, at *Kidwelly*, in the county of *Caermarthen*, to him and his heirs for ever. I also give and bequeath the sum of one shilling to my sister, Mrs. *Mary Carne*, for her unnatural behaviour to me, and in particular for filing a bill in Chancery against me without any just cause. I also give and bequeath to my friend *John Kilby* of *Haverfordwest*, Esq., the sum of 50*l.*; and I desire it to be understood that I should have left him more, but on account of the hardness of the times. And I desire my executor hereinafter mentioned, to give my servants mourning who shall be living with me at the time of my death. And I do hereby appoint *George Roch* of *Butterhill*, in the county of *Pembroke*, Esq., executor to this my will and testament."

The testator departed this life without revoking or altering his will, on the 9th of *February* 1826, and left the Plaintiff, *Mary Carne*, his only sister and sole heiress at law, surviving him.

The person in the said will named and described as "Mrs. *Roch*, of *Butterhill*, in the county of *Pembroke*, formerly Miss *Mary Jones*, of *Llethir*," was living at the time of making the said will, and of the death of the said testator, and is still living.

The Defendant in this case was, at the time of making the testator's will, and at the time of the said

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testator's death, the eldest son of the said Mrs. *Roch*, of *Butterhill*.

The question for the opinion of the Court was, whether the Defendant *George Roch*, as the eldest son of Mrs. *Mary Roch*, of *Butterhill*, named in the said testator's will, took any and what estate and interest in the real estate, devised by the said will to her heir at law?

Stephen Serjt. for the Plaintiff.

The Defendant *George Roch*, took no estate in the premises. It may be admitted, that in a will the word heirs may be used as a *designatio personæ*, — as meaning heir *apparent*, — but it can only be where the intention of the testator is most manifest. In *Buck* v. *Norton* (*a*), *Eyre* C. J. said, "Every testator ought to be supposed to take legal words in a legal sense, unless according to the marginal note in the case in *Hobart*, there be *demonstration plain* of an intent to use them in a different sense," and the marginal note in *Hob.* p. 33, is, "No man shall shew me a case in law where by purchase, by devise to an heir, any may take that is not heir indeed, without *declaration plain*." For if a testator use legal terms, he must be supposed to understand them. *Hodgson* v. *Ambrose* (*b*), *Pugh* v. *Goodtitle*. (*c*) All the authorities on the point, with the exception of *Scatterwood* v. *Edge* (*d*), are collected and considered in *Doe dem. Winter* v. *Perratt* (*e*), which confirms the principle to its full extent. *Goodright* v. *White* (*g*) resembles the present case, and may be relied on for the Defendant; but there the particular circumstances and dispositions

(*a*) 1 *B. & P.* 57.
(*b*) *Dougl.* 337.
(*c*) 3 *Bro. P. C.* 454.
(*d*) 1 *Salk.* 229.
(*e*) 5 *B. & C.* 48.
(*g*) 2 *Bl.* 1010.

of

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of the will, shewed to demonstration that, by the word heir, the testator meant heir apparent.

There is nothing in the present will, to shew that the testator knew Mrs. *Rock* to be living. [*Tindal* C. J. He describes her as of *Butterhill.*] That does not necessarily mean *residing* at *Butterhill;* it may mean only born at, or connected with, the place. *David Williams* is described by the testator not *of Kidwelly,* but living *at Kidwelly,* and as it does not appear that the testator knew the number or sex of Mrs. *Roch's* children, it cannot be presumed he had any particular individual in his mind when he spoke of her heir.

Russell Serjt. *contrà*, after propounding that the Defendant as eldest son of Mrs. *Roch* took an estate tail under the will, was stopped by the Court, and the following certificate was afterwards sent: —

We have heard this case argued by counsel, and have considered it, and we are of opinion that the Defendant *George Roch*, as the eldest son of Mrs. *Mary Roch* of *Butterhill*, named in the testator's will, took an estate tail in the real estates devised by the said will, as heir at law.

N. C. TINDAL.
S. GASELEE.
I. B. BOSANQUET.
E. H. ALDERSON.

1800.

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HAMILTON *v.* PITT and Others.

Where a Plaintiff arrested a Defendant for the amount of two items and recovered for one only, offering no evidence on the other, the Court discharged the Defendant on common bail, upon the Plaintiff arresting him a second time for the item in respect of which no evidence had been offered in the first action.

THE Plaintiff had arrested the Defendant *Pitt*, in an action for work and labour done by the Plaintiff as an attorney. One item of the Plaintiff's demand was 42*l.*, for work done under a commission of bankrupt; but the Plaintiff having delivered no bill of this item a month before the action, as the Chief Justice ruled at the trial he ought to have done, no evidence was given to establish it: a verdict and costs however were obtained for the residue of the demand.

The Plaintiff then arrested *Pitt* a second time, for other charges to the amount of 78*l.*; but in those charges included the 42*l.* for bankruptcy business, as to which he had given no evidence in the former action. In this second action he failed to establish the delivery of a bill as to the 42*l.* a month before the action, and something having been allowed by way of set-off, he recovered only 15*l.*, whereupon

Pitt, in person, obtained a rule *nisi* to be discharged on common bail, as having been twice arrested for the same cause of action.

Taddy Serjt. shewed cause. The rule was formerly very strict, and the Court always discharged a defendant where he had been arrested a second time for the same cause. But a different practice now prevails (*a*): and if a plaintiff, having misconceived his action, discontinues and pays costs, he may arrest *de novo*. *Bates* v. *Barry* (*b*). Here, at the utmost, the Plain-

(*a*) 1 *Str.* 439. (*b*) 2 *Wils.* 381.

tiff

tiff had only misconceived his action as to the 42*l.*, supposing the ruling of the Chief Justice to have been correct; (which it was not; for in *Crowder* v. *Davis* (*a*), the Court of Exchequer held, that business in bankruptcy is not business in respect of which an attorney is compellable to deliver a bill a month before action;) the Plaintiff was guilty of no vexation in the second arrest; it was only for a portion of the first cause of action; and the object of the Court in discharging Defendants on a second arrest for the same cause, is merely to repress vexation. *Cox* v. *Chubb* (*b*).

TINDAL C.J. The general rule is, that if the Plaintiff recovers costs in a first action, the Defendant cannot be re-arrested for any part of the same demand. In the case referred to, the plaintiff had paid costs in the first action, and so had been sufficiently mulcted.

In the present case, 42*l.*, a portion of the sum for which the Defendant was arrested in the second action, had been demanded in the former action in which the Plaintiff had obtained a verdict for part of his demand, and costs. The Defendant being arrested anew for this 42*l.*, is *bis vexatus pro eâdem causâ*, and the case in no respect resembles those where the Plaintiff has been mulcted in the costs of the first proceeding.

GASELEE J. I doubt whether there has been what may be termed vexation in this case; but I think the Defendant should be discharged on common bail.

BOSANQUET J. It seems to me that the second arrest was vexatious, within the meaning of the principle on which Defendants have been discharged in

(*a*) 5 *Young & Jar.* 433. (*b*) 2 *Bl. Rep.* 809.

similar

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similar cases, and that therefore this rule ought to be made absolute.

ALDERSON J. I am of the same opinion. As no new trial was moved for, the direction of the Chief Justice must be taken with all its consequences; and then the case is that of an attorney who sues for the amount of a bill which he has not delivered pursuant to the statute. If he be defeated in such an action, it is vexatious in law to arrest the Defendant a second time for the same bill.

Rule absolute.

Nov. 29.

SAME *v.* SAME.

Business done under a commission of bankruptcy, is not business in respect of which an attorney is compellable to deliver a bill a month before the action.

THE Plaintiff having, as before stated, recovered only 15*l.* in the second action, after arresting the Defendant *Pitt* for 78*l.*,

Pitt in person had obtained a rule *nisi* to be allowed his costs under 43 *G.* 3. *c.* 46. *s.* 3., on the ground that the arrest had been without reasonable or probable cause.

Taddy, who shewed cause, relied on *Crowder* v. *Davis* (*a*), as establishing that the Plaintiff was not bound to deliver the bill for bankruptcy business a month before the action: if so, the direction of the Chief Justice was erroneous, and the Plaintiff ought to

(*a*) 3 *Young* & *Jar.* 433.

have

have recovered 42*l.* more. (The propriety of the verdict was also contested as to the remaining items;) but

TINDAL C. J. saying, that if he had been referred to the case of *Crowder* v. *Davis* at the trial, he should unquestionably have held differently as to the delivery of the bill, and that in such case the Plaintiff could not be said to have arrested without probable cause, the rule was

Discharged.

MEMORANDA.

In the course of the last vacation, *William Horne* and *John Williams*, Esquires, two of His Majesty's counsel, were appointed Attorney and Solicitor-General to the Queen.

During this term, Lord *Lyndhurst* resigned the Great Seal, and was succeeded in the office of Lord High Chancellor, by *Henry Brougham*, Esquire, one of His Majesty's counsel, who was created a peer of the United Kingdom of *Great Britain* and *Ireland*, by the name, style, and title, of Baron *Brougham* and *Vaux*, of *Brougham*, in the county of *Westmoreland*. His Lordship took his seat on the bench of the Court of Chancery on *Thursday* the 25th of *November*.

Mr. *Justice Bayley* resigned his office of one of the Judges of the Court of King's Bench, and was appointed a Baron of His Majesty's Court of Exchequer.

William Elias Taunton, Esquire, one of His Majesty's counsel, was called to the degree of the *Coif*; and was appointed one of His Majesty's Justices of the Court of King's Bench, in the room of Mr. *Justice Bayley*.

Edward Hall Alderson, Esquire, was at the same time, called to the degree of the *Coif*, and appointed a Judge of the Court of Common Pleas. Also, on the same day, *John Patteson*, Esquire, was called to the degree of the *Coif*, and appointed a Judge of the Court of King's Bench. They all gave rings with the following

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ing motto, "*Nec temerè nec timidè.*" Soon afterwards they respectively received the honour of knighthood. 1830.

Sir *James Scarlett*, and *Sir E. B. Sugden*, having resigned their respective offices of Attorney and Solicitor-General, were succeeded in the same by *Thomas Denman*, Esquire, Common-Serjeant of the city of *London*, and *William Horne*, Esquire, one of His Majesty's counsel, who respectively received the honour of knighthood.

John Williams and *C. C. Pepys*, Esquires, were appointed Attorney and Solicitor-General to the Queen.

John Heath, Esquire, was called to the degree of the *Coif*, and gave rings with the motto, "*Metuit qui sperat.*"

Shortly after this term, Mr. Serjeant *Spankie* and Mr. Serjeant *Jones* received patents of precedence; and *Thomas Coltman*, Esquire, was appointed one of His Majesty's counsel.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

In the First Year of the Reign of WILLIAM IV.

1831.

BULL *v.* PRICE.

Jan. 13.

Plaintiff retained Defendant, a surveyor, to negotiate the sale of her reversionary interest in certain premises, and to give him 2 *per cent.* on the sum *obtained.* The premises were sold to the commissioners under the *Charing Cross* Improvement Acts, and a jury awarded the Defendant 4000*l.* The premises were charged with an annuity of 80*l.* a year, of which the Defendant had not apprised the Plaintiff, and the Defendant declining to induce the annuitant to be a party to the conveyance to the commissioners, they paid the money into the Bank, where it might be obtained by the parties entitled to it, upon application to the Court of Exchequer:

The money still being in the Bank, held, that the Plaintiff could not recover the 2 *per cent.* commission on the sale.

MRS. *PRICE*, the owner of a certain hotel called the *Key*, in *Chandos Street*, *Covent Garden*, had employed the Plaintiff, a surveyor, to value her property, and negotiate with the commissioners of the *Charing Cross* improvements for the sale of it. The retainer was as follows: —

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"Sir, — I hereby empower you to negotiate with the commissioners of woods and forests for the sale of my freehold ground in *Chandos Street* and *Vine Street*, and for my reversionary interest to the increased value of the same: and also for the benefit which I am entitled to by a clause in the leasehold held by Mr. *Armstrong* of No. 23. *Chandos Street*, empowering me to give the commissioners possession without the purchase of the good-will of his business, and the unexpired term of his lease. And I hereby undertake to pay you 2*l.* per cent. on the sum which may be obtained either by private treaty, arbitration, or trial by jury, for your trouble and exertions on my behalf.

"C. PRICE."

The Plaintiff valued the premises, and was in communication with the commissioners for a considerable time: the parties, however, could not agree, and the value of the premises was ultimately determined by a jury, who awarded Mrs. *Price* 4000*l.*

When she was called on to execute the conveyance, it appeared that the property was charged with an annuity to the amount of 80*l.* a year, and the commissioners required that the annuitant should be a party to the conveyance.

Mrs. *Price* declined to assent to this, and the payment of the money being, in consequence, postponed, the Plaintiff, who had never been apprized by Mrs. *Price* of the existence of the annuity, brought this action to recover for his services, 2*l.* per cent. on the sum awarded by the jury.

After the action was commenced, the commissioners paid the 4000*l.* into the Bank of *England*, where the parties entitled to it were enabled, under the *Charing Cross* improvements' act, to obtain it by application to the Court of Exchequer; but at the time of the trial Mrs. *Price* had not received any thing.

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The declaration contained a special count on the above retainer, and counts for work and labour.

Upon proof of the foregoing circumstances, *Tindal* C. J., before whom the cause was tried, nonsuited the Plaintiff, on the ground that Mrs. *Price* had not *obtained* the sum on which he claimed his 2*l.* per cent.

Jones Serjt. now moved to set aside the nonsuit. Within the meaning of this retainer, and according to the plain intention of the parties, the Defendant must be deemed to have obtained the sum on which the Plaintiff was to receive a per centage for his services, as soon as the amount was awarded by the jury. If a more literal construction be put on the word *obtained*, the Plaintiff may have exercised his skill, and have bestowed his labour for the benefit of the Defendant, and yet be deprived of his reward by circumstances over which he could have no control, or even by the wilfulness of the Defendant herself.

The Plaintiff is a surveyor, not a conveyancer; he is to ascertain the value of the premises, not the validity of the title; and he was not even apprised of the incumbrance which has occasioned the delay of actual payment. If the incumbrance should turn out to be greater in amount than the value of the property, the Defendant, literally speaking, would obtain nothing from the sale of it, and yet she would have had the full benefit of the Plaintiff's services in the valuation of the property by which she was enabled to discharge the incumbrance. But the money having been paid by the commissioners into the bank, it is the fault of the Defendant, if she declines to execute the conveyance which would entitle her to obtain it. In *Horford* v. *Wilson* (*a*), the defendant promised to pay the plaintiff 5*l.* if he would provide a tenant for certain premises, and get

(*a*) 1 *Taunt.* 12.

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him 350*l.* for his lease; the plaintiff procured one *Stevens* with whom the defendant entered into an agreement, and received 50*l.* as a deposit. The defendant afterwards released *Stevens* from his engagement, but retained the 50*l.*: and it was held, the plaintiff was entitled to recover his 5*l.* from the defendant.

A rule *nisi* having been granted,

Wilde Serjt. shewed cause. The Plaintiff might have stipulated that he should do no more than value the premises, and that he should be paid for the valuation at all events. But he has undertaken to negotiate for the sale of Defendant's reversionary interest, and to be paid in proportion to the sum that should be obtained for the same: it was therefore his duty to ascertain the incumbrances on the property, in order to set a value on the reversionary interest, and his assistance may be further required before it can be determined what the Defendant shall obtain. The payment into the Bank, therefore, does not alter the case. In *Horford* v. *Wilson*, the transaction was complete as far as regarded the agreement between the plaintiff and defendant; for the plaintiff had procured a tenant according to his undertaking, and the defendant had actually received a deposit on the lease. It was by the act of the defendant, that the tenant did not continue to occupy.

Jones. It is also the act of the Defendant here, that she has not obtained the money which the Plaintiff has put her into a condition to obtain. Upon paying off the incumbrance, or inducing the annuitant to join in the conveyance, the money at the Bank is hers.

TINDAL C. J. The question turns on the legal construction of the agreement between these parties. Looking at the retainer, we find that the Defendant offers to the

the Plaintiff, to employ him in negotiating with the commissioners for the *sale* of her premises; not for an *agreement* for the sale of them.

That goes some way towards enabling the Court to put a construction on the agreement; but looking to the language at the end, we find the Plaintiff is to have 2 per cent., not on the sum which may be agreed on, or awarded, or ascertained by a jury, but on the sum which may be obtained by the Defendant.

Coupling that with the former part, I think the commission was to be proportioned to the sum actually obtained, that is, received by the Defendant.

It has been urged, that upon this construction of the agreement, the Plaintiff's remuneration may be indefinitely postponed, or his claim be defeated by the wilful act of the Defendant. But such conduct on her part could not have been set up as an answer to this action.

The Plaintiff, in order to sustain his present demand, is bound to shew that he is entitled to a compensation, upon the value of the Defendant's property being ascertained, and before it has been obtained by her. That might be extremely inconvenient to the seller of an estate, uncertain at what time she may be paid; it might also be extremely unjust, because a small part only of the ascertained value might turn out to be ultimately payable to her; and I cannot agree that the engagement is to be viewed in a different light because the Plaintiff is a surveyor: if he choose to enter into such an engagement, he ought, out of the stipulated remuneration, to employ those who have the appropriate skill for the investigation of title.

The Plaintiff, therefore, has commenced his action, not only before the Defendant has received the amount ascertained, but before it has been actually ascertained what she is entitled to receive; for the money paid by the commissioners into the Bank is only to be got at by

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an application to the Court of Exchequer on the part of those who are entitled to receive it, and the annuitant must be paid.

The rule must be discharged.

GASELEE J. Without determining what would have been the effect if the precise value of the Defendant's reversionary interest had been paid into the Bank, it seems to me that the value of that interest has not yet been ascertained, because the value of the annuity has never been determined. On this ground, therefore, I think the nonsuit ought not to be set aside.

BOSANQUET J. I think this action has been commenced too soon, and that the nonsuit ought not to be set aside. The intention of the parties was, that the Plaintiff should receive two per cent. when the sum to be obtained by the sale of the premises should come to the disposition of the Defendant. The receipt of the money has not been obstructed, nor the remuneration of the Plaintiff been delayed by any wilful act on the part of the Defendant, but the time has not come for the payment of the sum upon which the Plaintiff is to be allowed the commission of two per cent. In *Horford* v. *Wilson*, the pleadings are not stated, but the defendant, by discharging the tenant from his undertaking, prevented the continuance of the tenancy which the plaintiff had stipulated to procure.

Rule discharged. (*a*)

In this case the Defendant died after the rule *nisi* to set aside the nonsuit had been obtained;

Upon which *Jones* objected, that there having been neither verdict nor judgment the suit abated. In

(*a*) *Park* J. and *Alderson* J. were absent.

Toulmin

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BULL v. PRICE.

Toulmin v. *Anderson* (*a*), where the Court, under similar circumstances, held that judgment might be entered up *nunc pro tunc*, a verdict had been taken, subject to a motion to enter a nonsuit; but

The Court held, that as judgment of nonsuit would have been entered up, but for the act of the Plaintiff in obtaining the rule *nisi*, the suit did not abate.

(*a*) 1 *Taunt.* 227.

PARRY *v.* DUNCAN.

Jan. 15.

REPLEVIN. The Defendant avowed for rent arrear, and upon a considerable length of pleading two issues were raised: one, *riens* in *arriere*; the other, that the Plaintiff had fraudulently removed the goods to avoid a distress.

At the trial a witness deposed to an admission by the Plaintiff that rent was due from him to the Defendant, and it was proved that he had been seen to carry candlesticks in his hand from the premises in respect of which the rent had accrued, (certain chambers in *Gray's Inn*,) to the premises on which the distress was made. This, however, was done openly, and there was no evidence to shew that no goods remained on the premises in *Gray's Inn*.

The jury, disbelieving the witness who spoke to the supposed admission by the Plaintiff, found that no rent was in arrear. Upon the other issue there was no finding.

1. The mere removal of goods by the tenant from premises demised, when rent is in arrear, is not, of itself, fraudulent as against the landlord; to justify the landlord in pursuing them he must shew that they were removed with a view to elude a distress.

2. In replevin, where the verdict is for the Plaintiff, the Court will not grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the Plaintiff's risk of paying double costs.

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E. Lawes Serjt. moved for a new trial on payment of costs, on the ground that the verdict was against the evidence upon the issue of *riens in arriere*, and that there was evidence enough to warrant a finding for the Defendant on the issue that the goods had been fraudulently removed to elude a distress. He cited *Opperman* v. *Smith* (*a*), and relied on the principle laid down by *Best* J., that "it is the duty of every tenant, when he is about to quit his residence, to pay his landlord his rent before he removes his goods, and the fact of removing the goods before the rent is paid, or in any manner provided for, implies something very like an intention to evade the payment altogether."

Wilde Serjt. shewed cause. In *Opperman* v. *Smith* the Defendant shewed that no goods were left on the premises in respect of which the rent accrued. The language of *Best* J. must be taken with a view to that circumstance, or has been stated in too unqualified a way by the reporter. It would be absurd to say, that every removal of goods by a tenant is fraudulent as against his landlord if rent be in arrear; for the goods may be removed for an honest purpose, as, to avoid a fire. Here, the removal was not so much as clandestine.

E. Lawes. If the removal be for the purpose of eluding a distress, it is fraudulent as against the landlord, even though it be not clandestine; for the statute 11 *G.* 2. *c.* 19., enables the landlord to pursue the goods for thirty days, when the removal is clandestine or fraudulent; and it is a fraud in law, if the landlord be by any kind of removal deprived of the means of obtaining his rent. The present is a case of great hardship, for if a new trial be refused, the landlord

(*a*) 4 *D.* & *R.* 33.

loses

loses rent which the tenant has admitted to be due, and incurs besides the expense of voluminous pleadings.

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TINDAL J. We should pause in discharging this rule, if the consequence of our discharging it were to deprive the Defendant of all remedy for his rent. But he may still recover that, if it be due, in an action for use and occupation; while, on the other hand, if we were to make the rule absolute, the Plaintiff might, by the result of another trial, be called on to pay double costs, and his sureties be rendered subject to a liability from which they are now exempt.

Under such circumstances we ought not to set aside the verdict, unless there are clear grounds for doing so. I have some doubt whether the issue which has been found for the Plaintiff was correctly found by the jury; but before the Defendant can ultimately succeed, he must establish the second issue, namely, that the goods were fraudulently removed; and upon the evidence which has been offered there is nothing to make that out; nothing to shew that the goods were removed with the view to elude a distress, or that no goods remained on the premises demised. It seems to me that, under these circumstances, no sufficient ground has been shewn for sending the cause down again.

BOSANQUET J. I think there is no ground for a new trial in this case. I should have been better satisfied if the verdict on the issue of *riens* in *arriere* had been the other way; it would, however, be of no use to send the cause down again, unless it were shewn that the other issue would probably be found for the Defendant, a result which the evidence before us would by no means justify. In the case referred to it was shewn that the premises demised were stripped of property.

ALDERSON

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PARRY v. DUNCAN.

ALDERSON J. I concur with the rest of the Court.

To warrant us in setting aside this verdict, we must be satisfied, not only that the finding on the first issue is wrong, but that the Defendant is likely to succeed on the second issue if the cause be sent down again. There is, however, nothing before us to shew that the goods were removed with a view to deprive the landlord of his distress.

Rule discharged.

Jan. 15.

BLEADEN *v.* CHARLES.

H. deposited with the Defendant as a security for goods sold, a bill accepted by Plaintiff, for which Plaintiff had received no value.

H. afterwards paid for the goods, and asked for the restoration of the bill; but the Defendant indorsed it for value to *G.* who sued the Plaintiff and recovered: Held,

That the Plaintiff might recover of the Defendant the amount of the bill in an action for money paid to the use of Defendant, but not the costs of the action by *G.* against Plaintiff.

ASSUMPSIT for money paid by the Plaintiff to the use of the Defendant, under the following circumstances: —

Early in the last year, one *Hay*, who was indebted to the Plaintiff, upon a certain emergency drew a bill for 68*l.* 15*s.*, which the Plaintiff accepted and delivered to *Hay* to assist him in his difficulty.

Hay, however, got over the difficulty without having recourse to the bill, and shortly afterwards gave it up to the Plaintiff; but before the Plaintiff had destroyed it, *Hay* bargained with the Defendant for 20*l.* worth of goods, which the Defendant refused to sell without some security for payment; whereupon *Hay* again obtained from the Plaintiff the bill for 68*l.* 15*s.*, which he indorsed, and, disclosing the circumstances under which it had been obtained, placed in the hand of the Defendant as a security for the payment of the goods in question; the goods were thereupon delivered to *Hay*.

Hay afterwards paid for them by a check on his banker,

banker, and requested the Defendant to restore the bill for 68*l.* 15*s.* *Hay*, however, being still indebted to the Defendant to a considerable amount, the Defendant refused to restore the bill, and afterwards indorsed it to one *Henderson*, to whom he was himself indebted. *Henderson* sued the Plaintiff, who was thereupon obliged to pay the bill and the costs of the action.

The Plaintiff then commenced this suit against the Defendant, for the amount of the bill and the costs of *Henderson*'s action.

The declaration contained a special count, and a count for money paid, but the special count was abandoned.

Gaselee J., before whom the cause was tried, left it to the jury to say whether the bill was left as a security for the 20*l.* worth of goods supplied by the Defendant to *Hay*, or for the whole of *Hay*'s debt.

The jury found that the bill was left as a security for those goods only, and gave a verdict for the Plaintiff for the amount of the bill and the costs of *Henderson*'s action. An objection having been made on the part of the Defendant, that the action did not lie, the learned Judge saved the point; whereupon

Spankie, Serjt., obtained a rule *nisi* to enter a nonsuit instead of the verdict, on the ground that there was no privity between the Plaintiff and Defendant, and that, therefore, the money could not be said to have been paid to the use of the latter. 'At all events the Defendant was not responsible for the costs of *Henderson*'s action, which the Plaintiff ought not to have resisted.

Wilde Serjt. shewed cause. By the deposit of the bill in the Defendant's hands, the Plaintiff became a surety to the Defendant for *Hay*, and that would raise a sufficient

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sufficient privity between the Plaintiff and Defendant, if privity be necessary to the support of the action. But the Plaintiff having, by the neglect or bad faith of the Defendant, been compelled to pay a sum of money of which the Defendant has had the advantage, the Plaintiff is entitled to recover it in an action for money paid to the use of the Defendant. In *Exall* v. *Partridge* (*a*), where the goods of a stranger on the premises of a tenant were distrained by the landlord for rent in arrear, and the stranger was obliged to pay the rent to redeem them, it was held that the stranger might maintain assumpsit for money paid to the use of the original lessees, who were bound by their covenants to the landlord, although some of them had, to the knowledge of the Plaintiff, before he placed his goods on the premises, assigned their interest to one of the co-lessees, who was in the exclusive possession at the time.

The principle, that a party who takes negotiable instruments without due enquiry is liable to the issuer of them, was acted upon in *Down* v. *Halling* (*b*), where the owner of a check, drawn upon a banker for 50*l*., having lost it by accident, it was tendered, five days after the date, to a shopkeeper in payment of goods purchased to the value of 6*l*. 10*s*., and he gave the purchaser the amount of the check, after deducting the value of the goods purchased: the shopkeeper the next day presented the check at the bankers, and received the amount: it was held, that in an action brought by the person who lost the check, against the shopkeeper to recover the value of the check, the jury were properly directed to find for the plaintiff, if they thought the defendant had taken the check under circumstances which ought to have excited

(*a*) 8 *T. R.* 308. (*b*) 4 *B. & C.* 330.

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the suspicion of a prudent man. In *Pownal* v. *Ferrand* (*a*), the indorser of a bill, being sued by the holder, paid him part of the sum mentioned in the bill: and it was held, that he might recover the same from the acceptor, in an action for money paid to his use.

(The claim to the costs of *Henderson*'s action was abandoned.)

Spankie. The action for money paid does not lie unless there be some compulsion on the Plaintiff, arising out of an antecedent privity. Here there was no communication between the Plaintiff and Defendant as to the terms on which *Hay* had obtained the bill of the Plaintiff; the bill was passed to the Defendant in the usual way, and there is no ground for contending that the Plaintiff was security for *Hay*. In *Exall* v. *Partridge* and *Pownal* v. *Ferrand*, the money was paid directly and immediately to the use of the defendants. *Down* v. *Halling* was a case of negligence in the defendant, and the proper action would have been trover, but the plaintiff elected to waive the tort.

TINDAL C. J. It seems to me that this transaction amounts to money paid by the Plaintiff for the use of the Defendant. The money has been paid by him in a way which has been serviceable to the Defendant, and there appears to have been a privity between them arising out of the manner in which the bill was obtained and deposited as a security, the Defendant being apprised that nothing was due from the Plaintiff to *Hay*. But it is clear that after *Hay* had paid the Defendant for the goods, the indorsement of the bill by the Defendant was wrongful, and the payment by the Plaintiff upon *Henderson*'s suing him, compulsory.

(*a*) 6 *B.* & *C.* 439.

There

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There has been, therefore, a compulsory payment by the Plaintiff, induced by an act of the Defendant; an act of which he has had the full benefit. That, is money paid to the Defendant's use. If the Defendant had sued the Plaintiff on the bill, the circumstances under which it was deposited, and the payment by *Hay*, would have been a good answer to the action; it would be singular, therefore, if he could put the bill in circulation, and make the Plaintiff pay the amount for his benefit, indirectly, without rendering himself liable to repayment.

GASELEE J. The Plaintiff is entitled to the judgment of the Court. I put it on the ground that where the price of the goods for which the bill was deposited as a security was tendered or paid, the Defendant had no longer any right to the bill, but was in the condition of a person who had simply found it. The Plaintiff, therefore, was compelled to pay by the wrongful act of the Defendant, and as the Defendant had the benefit of the payment, the money must be considered as paid to his use.

BOSANQUET J. I am of opinion that the Plaintiff is entitled to recover for money paid to the use of the Defendant. The Defendant was in possession of an acceptance of the Plaintiff which he had no right to retain, much less to make use of. No value had been received by the acceptor, nor after the payment by *Hay* had any been given by the Defendant. Nevertheless he negotiates the bill and the Plaintiff is compelled to pay it. Even if he had negotiated it with the consent of the Plaintiff, it would have been the ordinary case of an accommodation bill, in which the acceptor would have been entitled to recover the amount again; and

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as the case stands, the money has clearly been paid to the use of the Defendant.

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BLRADEN v. CHARLES.

ALDERSON J. The money was clearly paid to the use of the Defendant, inasmuch as it released him from so much of his debt to *Henderson*. The Plaintiff, therefore, is entitled to recover.

Rule discharged.

BUCKWORTH *v.* LEVY.

Jan. 17.

INDORSEE against drawer.

The affidavit to hold to bail was, "that the Defendant was justly and truly indebted to the Plaintiff in the sum of 1115*l.* on a bill of exchange, drawn by the Defendant on the firm of *Cooper* and *Levy*, for the payment of the said sum to the Plaintiff or his order at a day now past."

In an action by indorsee against drawer, the affidavit to hold to bail must allege the default of the acceptor.

Spankie Serjt. obtained a rule *nisi* to set aside the bail-bond, on the ground that this affidavit was insufficient, as not shewing that the bill had been dishonoured by the acceptor. According to the language of the Court in *Machu* v. *Fraser* (*a*), every word in the affidavit might be true, and yet the Plaintiff might have no right to arrest the Defendant.

Jones Serjt. shewed cause against the rule, when the Court, referring to the ordinary form of affidavit in actions by indorsee against drawer as set out in *Tidd*'s Appendix, where the defendant is alleged to be in-

(*a*) 7 *Taunt.* 171.

debted

1831.

BUCKWORTH v. LEVY.

debted on the default of the acceptor, called on *Jones* to point out a case in which an affidavit, such as the present, had been held sufficient in an action against the drawer: *Hughes* v. *Brett* (*a*) was an action against the acceptor. The learned Serjt. did not cite any such case, but insisted that, according to the dictates of common sense, the drawer could not be indebted to the indorser on a bill payable at a day past, unless there had been a default on the part of the acceptor. [*Alderson* J. That is stating the debt argumentatively, and not positively.] It is sufficient if a *primâ facie* liability be alleged. Payment by the acceptor would be matter of defence. If the affidavit ought to allege the default of the acceptor, it ought also to allege notice thereof to the drawer, in which case it must be framed with the precision of a declaration, and contain all the averments necessary to be proved at the trial. No case has decided that the affidavit in an action against the drawer must allege the default of the acceptor.

TINDAL C. J. The drawer of a bill of exchange is not primarily liable to the holder, but only on failure of payment by the acceptor, and though the affidavit to hold to bail need not be framed with the precision of a declaration, enough should appear to shew that the obligation, which is not primary, has been incurred. There is nothing on the present affidavit, which discloses that the Defendant's liability has been incurred, and there is no reason why the Court should struggle to support a party who has not followed the ordinary form employed on similar occasions.

PARK J. I am of the same opinion. The whole argument in support of the affidavit rests on the word

(*a*) 6 *Bingh.* 239.

indebted;

indebted; but that of itself is not sufficient, for the Plaintiff must shew *how* the Defendant is indebted, and a drawer is not even primarily liable till there has been a default on the part of the acceptor. The argument, that if the default of the acceptor be alleged, notice thereof to the drawer ought also to be alleged, is without weight; for there are cases in which notice to the drawer is not necessary: in all cases the want of it is matter of defence alone, and does not discharge the drawer from his *primâ facie* liability.

BOSANQUET J. I think the rule should be absolute; I rest on the ground that it is part of the ordinary form of affidavit in an action against the drawer to allege the default of the acceptor; and a party who neglects to adopt the ordinary form has no claim to the favour of the Court.

ALDERSON J. The principle is, that the defendant must be shewn by the affidavit to have been indebted at some one moment. The moment there has been a default on the part of the acceptor the drawer becomes liable, and it is not necessary for the affidavit to go further; the rest is matter of defence. But it must be shewn *how* the defendant is indebted; and a drawer only becomes indebted to the holder by the default of the acceptor.

Rule absolute.

1831.

Jan. 19.

HARE *v.* RICKARDS and Another.

Held, that interest was not payable on the following instrument, given by the Defendants to the Plaintiff: — "We hereby undertake to pay you, agreeably to instructions from *J. W.*, the sum of 1262*l.* on his account, as soon as we shall have received from *R.* and *R.*, of *New South Wales*, the amount of monies in their hands belonging to *J. W.*, and now under attachment by you."

ASSUMPSIT on the following undertaking: —

"*London*, 2d *Oct.* 1827.

"To Mr. *Joseph Hare*, *Great Warwick Street*.

"Sir, — We hereby undertake to pay you, agreeably to instructions from Mr. *John Wrentmore*, the sum of 1262*l.* 5*s.* 6*d.* on his account, as soon as we shall have received from Messrs. *Rain* and *Ramsay*, of *New South Wales*, the amount of monies in their hands belonging to Mr. *Wrentmore*, and now under attachment by you.

"RICKARDS, MACKINTOSH, and Co."

The instructions referred to in this undertaking were as follow: —

"To Messrs. *Rickards*, *Mackintosh*, and Co.

Gentlemen, — I hereby authorize and request you to pay to Mr. *Joseph Hare*, in consideration of his having agreed to release an attachment on certain monies of mine which is to come into your hands from Messrs. *Rain* and *Ramsay*, of *New South Wales*, the sum of 1262*l.* 5*s.* 6*d.* out of the said monies, when you shall receive it on my account. The said payment to be taken by Mr. *Hare* in discharge of a bill for 1262*l.* 5*s.* 6*d.* dated this day at nine months date, and which bill I

By the instructions from *J. W.*, the payment was to be taken in discharge of a bill of *J. W.*'s at nine months after date, in the hands of Plaintiff, and which Defendants were to receive from him on payment of the 1262*l.*

must

1831.

HARE v. RICKARDS.

must request of you to receive from Mr. *Hare* at the time of payment as a sufficient discharge.

"1st *Oct.* 1827." "J. WRENTMORE."

A sufficient sum for the discharge of the Defendants' undertaking arrived from *New South Wales* in the hands of the Defendants by the month of *February* 1828. But *Wrentmore* having, at the date of the undertaking, more than 4000*l.* in the hands of *Rain* and *Ramsay*, a contest arose on the construction of the instrument: Whether the Defendants were bound to pay the Plaintiff on the arrival of a sufficient amount from *New South Wales*; or whether they were entitled to postpone the payment till the arrival of the whole 4000*l.*, and the discharge of any lien they might have on the same?

The Court taking into consideration *Wrentmore*'s instructions, which they considered as incorporated by reference in the Defendants' undertaking, held, that the Defendants were bound to pay on the first arrival of a sufficient amount from *Rain* and *Ramsay*: and the verdict having been entered for 1262*l.* 5*s.* 6*d.* after the discussion of a rule to set it aside,

Wilde Serjt. moved to increase it by the amount of interest on the sum from the time of its arrival in *England*.

Taddy and *Stephen* Serjts. shewed cause. The rule as to interest is now well settled. It is confined to bills of exchange and like instruments; to contracts expressly reserving interest; and contracts which carry it by mercantile usage. *Gordon* v. *Swan* (*a*), *Foster and Others* v. *Weston* (*b*), *Page* v. *Newman* (*c*), *Higgins* v. *Sargent*. (*d*) In *Arnott* v. *Redfern* (*e*), the *assumpsit* was on a *Scotch*

(*a*) 12 *East*, 419.
(*b*) 6 *Bingh.* 709.
(*c*) 9 *B.* & *C.* 379.
(*d*) 2 *B.* & *C.* 348.
(*e*) 3 *Bingh.* 353.

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judgment, which carries interest in *Scotland*; and on that ground it was holden that interest might be considered in calculating the amount of the damages. In *Slack* v. *Lowell* (*a*), the defendant had promised to pay for goods by a bill of exchange. It was holden, therefore, that he was liable to interest, which he must have paid if he had given the bill.

Wilde and *Spankie* Serjts. in support of the rule. The Plaintiff is entitled to interest according to the principle in *Slack* v. *Lowell*. He would have recovered it in an action on *Wrentmore*'s bill, had he sued on that, in case of a default on the part of the Defendants to fulfil their undertaking. And *Wrentmore* would have recovered the amount in damages from the Defendants, if he had sued them for the consequences of their default. The Defendants' undertaking is in effect a contingent guarantee to pay a bill of exchange, the undertaking referring to and consequently incorporating *Wrentmore*'s instructions. The Defendants were not to pay 1262*l.* 5*s.* 6*d.* nakedly, but on the receipt of a bill to that amount given by the Plaintiff to *Wrentmore*.

TINDAL C. J. If this had been a direct guarantee for the payment of a bill of exchange, the Defendants would have been in the same situation with respect to interest as a party to the bill. But this is an undertaking to pay a sum which has no direct reference to any bill; the bill mentioned in the instructions is only referred to as an outstanding security, which the Defendants are requested to call in upon payment of the sum for which they have made themselves answerable. Upon the payment of that sum, they have discharged their engagement; an engagement made when it was

(*a*) 3 *Taunt.* 157.

doubtful

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doubtful whether the Plaintiff would ever have been in a situation to demand interest even against *Wrentmore*; for the bill was to be given up on the payment of the money, and the money might have arrived before the bill was payable.

This, therefore, is within the class of cases in which, if the Plaintiff has sustained any loss of interest, it must be ascribed to his own neglect in not pursuing his remedy as soon as he was enabled to do so.

PARK J. I am of the same opinion. In *De Havilland* v. *Bowerbank* (*a*) Lord *Ellenborough* laid down the rule, "That interest ought to be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, &c.; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has been used, and interest has been actually made." The present case does not fall within any of those classes. Mr. Justice *Buller* once held, in a case of great hardship, that interest might be recovered on a policy of insurance; but the decision was never approved of. In *Arnott* v. *Redfern* this Court thought that the plaintiff was entitled to interest in the shape of damages on a *Scotch* judgment, because the judgment carried interest in *Scotland*. But though I coincide in the propriety of that decision, there are some general expressions in the judgment in which I am not disposed to concur. The present case not falling within any of the decisions, the rule must be discharged.

BOSANQUET J. I think that new and refined distinctions ought not to be introduced into the law on this

(*a*) 1 *Camp.* 51.

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subject. It has been argued, that this agreement is in substance an undertaking to pay a bill of exchange, and *Slack* v. *Lowell* has been referred to. This, however, is not an undertaking to pay a bill of exchange, but to pay a sum on the arrival of money in this country from *New South Wales*. And interest might never have been payable even on the bill; as if the money had arrived, and the bill had been given up, before the bill became due.

ALDERSON J. concurred, and the rule was

Discharged.

Jan. 20.

EMET *v.* OGDEN.

Defendant gave Plaintiff to understand he intended to move to set aside an award between them.

Plaintiff, who intended to make the same motion, allowed a term to elapse, and then moved, the Defendant having omitted to do so:

Held, no sufficient reason for the delay.

WILDE Serjt., on the part of the Plaintiff, moved to set aside an award made in *October* last, and assigned as a reason for not applying earlier, that previous to *Michaelmas* term the Defendant had applied to the Plaintiff's clerk to make an affidavit of the execution of the submission, in order to ground thereon an application, on the part of the Defendant, to set the award aside. Waiting the issue of that application, which the Defendant never made, the Plaintiff allowed *Michaelmas* term to elapse without coming to the Court.

Per Curiam. He ought not to have relied on the Defendant, but to have proceeded himself. The application is too late, and no sufficient reason has been assigned for the delay.

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Charges by an attorney for attending and advising a party in a suit, are taxable charges; and though they be the only taxable charges in a bill of many items, the attorney cannot recover any part of his demand without leaving his bill with Defendant a month before action, according to 2 *G.* 2. *c.* 23.

THE Plaintiff, an attorney, sought by this action to recover the sum of 53*l.* 3*s.* 7*d.* for business of various kinds, and money lent.

No bill had been delivered to the Defendant a month previously to the commencement of the action; but among the various items which constituted the plaintiff's demand were the two following: —

	s.	*d.*
"*Nov.* 6. — You having been served with a writ, after paying the amount of debt, attending you, conferring and advising thereon - - - -	6	8
"*Dec.* 10. — Attending you, advising you on the action that had been brought against you at the suit of *Mather*, and advising -	6	8"

It was objected at the trial that these were taxable items, and that therefore the Plaintiff was not in a condition to sue, for want of a bill delivered pursuant to the statute 2 *G.* 2. *c.* 23. *s.* 23.; and *Tindal* C. J., who presided, being of this opinion, the Plaintiff called a witness, who proved that the Plaintiff had put 3*l.* into the Defendant's hands to discharge the costs in *Mather's* action.

The Chief Justice, however, thought, that this did not alter the case, and directed a nonsuit.

Taddy Serjt. obtained a rule *nisi* to set aside this nonsuit, and enter a verdict for 53*l.* 3*s.* 7*d.*, or for 3*l.*, on the ground that these were not taxable items, and that, at all events, the Plaintiff might recover the 3*l.* ad-

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vanced to the Defendant, that being a distinct and separate claim.

Spankie Serjt. shewed cause. The items are taxable; they are charges of fees for business done in the course of a suit. The business had reference to a suit, and to nothing else; and it is immaterial whether the work was done within the walls of a court or its offices, or of the Defendant's own house. If the two items are taxable, they draw the whole demand within the operation of the statute, and the Plaintiff is not allowed to recover on any separate item. *Winter* v. *Payne* (*a*), *Hill* v. *Humphreys* (*b*), *Benton* v. *Garcia* (*c*), *Watt* v. *Collins* (*d*), *Thwaites* v. *Makinson.* (*e*) In *Mowbray* v. *Fleming* (*g*), where an attorney not having delivered any bill to his client before action brought, was held entitled to recover items of charge for money paid for his client's use, those items had no reference to his business of an attorney.

Taddy and *Jones* Serjts. in support of the rule.

These are not taxable items. The statute has reference only to business actually done in the course of a cause; as, a step taken in court; and not the mere giving of advice, which may as well be given by any other as by an attorney; and for which an uncertificated attorney would not be liable to penalties. By *s.* 23. of the act, the attorney's bill is taxable upon application to a judge of the *court in which the business has been transacted*; the act, therefore, contemplates only charges for business done in court. In *Burton* v. *Chatterton* (*k*), *Best* J. said, "A party cannot properly be said to proceed,

(*a*) 6 *T. R.* 645.
(*b*) 2 *B. & P.* 343.
(*c*) 3 *Esp.* 149.
(*d*) *Ry. & M.* 284.
(*e*) 1 *M. & M.* 199.
(*g*) 11 *East*, 285.
(*k*) 3 *B. & A.* 489.

either

either at law or in equity, until something be done by him under the authority of a Court." And in *Mowbray* v. *Fleming* some of the Judges doubted whether the first item was to be considered as any thing more than an attendance by the defendant's desire for the purpose of compromising the suit against his brother. In *Watt* v. *Collins*, the Chief Justice said, "It is necessary to be assured of business having been done in a cause, or that proceedings in a court have existed, in the conduct of which the defendant has received assistance from the plaintiff as an attorney; it is enough that this may be fairly collected from the nature of the charge itself." In *Fenton* v. *Correa* (*a*), a charge for a search at the judgment office was held not a taxable item. *Winter* v. *Payne* goes to the extent of the rule; and there it was held, that if any part of an attorney's bill be for business *done in the court*, the bill must be delivered a month before the action is brought, otherwise the plaintiff could not recover.

At all events, the loan of 3*l.* was a distinct transaction, on which the plaintiff was entitled to sue; for the defendant having received the money, might employ it in any way he pleased. It cannot be called a charge or disbursement at law or in equity. In *Prothero* v. *Thomas* (*b*), it was held, that an attorney, who, at the defendant's request, put in bail for him, and afterwards paid the debt and costs, need not deliver a bill a month before he sued for the money so advanced.

TINDAL C. J. I thought at the trial, and still think, that these two items were taxable, and that therefore the Plaintiff's demand fell within the statute of 2 *G.* 2. *c.* 23.

It is always difficult, when we come to extreme cases,

(*a*) *R.* & *M.* 262. (*b*) 6 *Taunt.* 196.

to

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to say whether they are within the rule or not, and this, perhaps, is on the very edge; but seeing that the act is remedial, it is better to draw in a case on the extreme verge of the rule than to leave it without.

These items are charges for advising on steps in a suit by *Mather*, and attendances on the Defendant.

The words of the act are, "No attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, a bill of such fees, charges, and disbursements."

And the question is, whether when the Defendant is sued and consults with an attorney on the subject of the suit, and a fee is charged for the advice given, that is not a fee for business in a court of law. In one case, the charge for consulting about bail and endeavouring to procure bail, was held a charge within the statute, although the bail were unable to justify. In another case, the preparing and swearing an affidavit to hold to bail has been holden within the act, though such affidavit is made before any process issues, and is not entitled in the cause. There are many other cases which have not now been mentioned, governed by the same principle. In *Sandom* v. *Bourn* (*a*), the charge was for preparing a warrant of attorney, which, until it was filed, was not an act in court. And in another case (*b*), a charge for preparing a warrant was held a taxable item, although the warrant was never executed. It seems, therefore, that the Defendant has a right to question the amount of this fee before an officer of the Court, and the officer would have had power to reduce it, if too high. Although the charge may be on the

(*a*) 4 *Campb.* 68. (*b*) 2 *Stark.* 538.

verge

verge of the rule, yet as the act is remedial, and for the benefit of suitors, I think the charge is within its operation.

As to the 3*l.*, the money having been lent for costs in *Mather's* action, it is the same thing as if it had been paid by the attorney, using the hands of the Defendant.

PARK J. There is no dispute as to the rule that one taxable item draws into its vortex all others in the same bill. That shews that the act of 2 *G.* 2. has been held a remedial act. The question therefore is, how the mind of an individual is struck with each particular case? I have no difficulty here, because I have often at chambers referred to taxation items such as the present, and I think it would be pernicious to relax the rule. Has there, in this case, been a proceeding in a cause? The writ sued out by *Mather* had brought the Defendant into Court, and the payment of the 3*l.* makes the case clearer against the Plaintiff, shewing the proceeding to have been one in which the Plaintiff not only gave his advice, but advanced money to pay costs. The case is the same as if he had paid the money into court when proceedings were *ore tenus*. The cases to which the Chief Justice has referred are almost as strong as the present, and *Watt* v. *Collins* is not distinguishable.

BOSANQUET J. I am of the same opinion, and think that the nonsuit was right. Unless the act had been deemed remedial, the Court would not have been warranted in holding, as they have done, that one taxable item draws the others to it. The question therefore is, if there be one taxable item here. That which relates to *Mather's* suit appears to me to be such. Within the words of the statute it is a proceeding in court, because it is a proceeding in a cause, which cause is a proceeding in court. The 3*l.* cannot be separated

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separated from the residue of the demand; but it was a sum clearly lent with reference to *Mather*'s suit, and whether the Plaintiff paid it himself, or sent his clerk, or gave it to the Defendant to pay, is the same thing.

ALDERSON J. I ought to feel considerable doubt, after the judgment which has been delivered by the rest of the Court; but, on the best consideration which I can give the case, I still think that these were not taxable items. What is the definition of a taxable item? One which it is competent to the Court to refer to taxation. Now it is competent to the Court, under 2 *G.* 2. *c.* 20. *s.* 23., to refer charges in an attorney's bill to a Judge of the Court "in which the business contained in such bill shall have been transacted." The power, therefore, is limited and confined to business done in court, and I cannot think that advising with a client is business done in court. The view which I take, appears to have been taken by the Court of King's Bench in *Burton* v. *Chatterton*. In that case, the charges for drawing an affidavit of a petitioning creditor's debt were holden not to be within the act, the affidavit not having been sworn. There Lord *Tenterden* said, "We ought to be quite satisfied, before we nonsuit a plaintiff on this ground, that there was some authority to which these items could have been referred for taxation." The case of *Sandom* v. *Bourn* is, I agree, an authority the other way: but the authority of that case, after the decision in *Burton* v. *Chatterton*, is not to be relied on. I am therefore of opinion, that these items, not being for business done in court, are not taxable: I agree, that if one item be taxable the statute applies, and that the 3*l.* cannot be separated from the rest of the demand.

Rule discharged.

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REPLEVIN. Avowry for rent arrear as follows: — And the said *Robert* well avows the taking, &c. because he says that the said Plaintiff, for one year before *June* 24th, 1830, and thence until and at the time when, &c., held and enjoyed the dwelling-house, in which, &c. with the appurtenances as tenant thereof *and* the said *Robert*, by virtue of a certain demise thereof to the said Plaintiff, theretofore made at and under certain yearly rent, to wit, the yearly rent of 57*l.* 15*s.*, payable quarterly, to wit, on, &c.; and because a large sum, to wit, 57*l.* 15*s.* of the rent aforesaid, for four quarters ending respectively, on, &c. was due and in arrear from the said Plaintiff to the said *Robert*, he, the said *Robert*, avows the taking, &c. in the said dwelling-house, in which, &c. as just, as for and in the name of a distress for the said rent so due and in arrear as aforesaid *and* the said *Robert*, &c. And this the said *Robert* is ready to verify; wherefore, &c.

The want of a precise allegation in an avowry, that the Plaintiff was tenant to the avowant, is not fatal, if it can otherwise be collected from the avowry that the Plaintiff was such tenant.

Special demurrer, for that it was not stated of whom the Plaintiff held the house as tenant. Joinder.

E. Lawes Serjt., in support of the demurrer, insisted that the most important allegation of an avowry was here wholly wanting, namely, that the Plaintiff held the premises in respect of which the distress was made as tenant to the avowant; and that, consequently, the avowry could not be sustained.

Sed per Curiam. It is impossible not to perceive that the word *and* has crept in by mistake for the word *to*, and

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and that there is, upon this avowry, a sufficient allegation of a demise to the Plaintiff. If we reject the words, *and the said Robert*, as surplusage, we may collect from the rest of the avowry that the Plaintiff was tenant to the avowant. For it is alleged that the Plaintiff, at the time when, &c. held the house as tenant under a demise thereof at a yearly rent; and because 57*l.* 15*s.* of that rent was due and in arrear from the Plaintiff to the avowant, the avowant distrained.

If rent was due from the Plaintiff to the avowant, as accruing under a demise of premises which the Plaintiff still occupied, the rent could only be due from him in the capacity of tenant to the avowant.

Judgment for the avowant.

JAMES, Gent., one, &c., *v.* COTTON.

Plaintiff engaged to let Defendant land on building leases, and to lend him 4000*l.* to assist him in the erection of twenty houses; the money to be repaid by *June* 1828. Defendant agreed to build the houses, to convey them as security for the loan, and repay the money: when six houses were built, and 1168*l.* had been advanced, Plaintiff requested Defendant not to go on with the other fourteen houses: Defendant desisted: Held, that after *June* 1828 the Plaintiff might recover the 1168*l.* on a count for money lent; and that it was not necessary to sue on the agreement.

THIS was an action of *indebitatus assumpit*, and the declaration contained counts for money lent, goods sold, and other common counts.

It was agreed that a verdict should be entered for the Plaintiff, damages 4000*l.*, costs 40*s.*, subject to a reference.

The arbitrator awarded,

That the verdict entered for the Plaintiff should stand, but that the damages should be reduced from the sum of 4000*l.* to 1438*l.* 11*s.*; and found as follows:—That the action was commenced in *Trinity* term 1829:

That

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That the declaration contained counts for goods sold and delivered, money lent, money paid laid out and expended, money had and received, counts for interest, and upon an account stated; to which the Defendant pleaded the general issue, and delivered a notice of set-off for work and labour and materials found, for goods sold and delivered, money lent, money paid, laid out, and expended, money had and received, money due on the balance of an account stated between the parties, and for interest due from the Plaintiff to the Defendant.

The arbitrator also found that an agreement in writing, not under seal, bearing date the 31st of *May* 1827, was duly made and executed by and between the Plaintiff and Defendant, whereby, [after reciting that the Plaintiff was seised of, or otherwise well entitled to the fee simple and inheritance in possession, of certain lands and hereditaments situate at *Worthing*, in the county of *Sussex*, and that the Plaintiff had agreed to grant to the Defendant, who had agreed to accept and take, a lease or leases of part of the said lands and hereditaments for the purpose of building messuages or tenements and other erections thereon for the term, at the several rents, and under and subject to the covenants, stipulations, and agreements thereinafter expressed,] — It was witnessed, and the Plaintiff, in consideration of the covenants and agreements thereinafter contained, on the part of the Defendant to be observed and performed, did thereby for himself, his heirs, executors, and administrators, covenant and agree with the Defendant, his executors, administrators, and assigns, that the Plaintiff, his heirs and assigns, should and would, when and so soon as the said Defendant should have covered in the six messuages thereinafter contracted to be built, (upon the same scale and dimensions as the houses then built upon other parts of the said

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said ground,) on the six plots or parcels of ground next thereinafter described, in a good and substantial manner, upon the request and at the expense, in all things, of the Defendant, grant and execute one or more good and effectual lease or leases to him (subject always, by way of security to the Plaintiff, in the first place, for such monies as the Plaintiff might have lent and advanced as thereinafter agreed, and of such goods as the Plaintiff might have furnished or supplied to the Defendant,) of all those six plots or parcels of ground, part of a larger piece of ground of the Plaintiff, situate at *Worthing* aforesaid, as the same plots of ground were drawn, distinguished, and described upon and by the said agreement, to hold the same to the Defendant, his executors, administrators, and assigns, for the term and at the yearly rents, and upon the conditions in the said agreement mentioned. And the Plaintiff further covenanted and agreed with the Defendant, that the Plaintiff should and would, when and so soon as the Defendant should have covered in fourteen messuages, thereinafter contracted to be built, on the plot of ground next thereinafter described, in a good and substantial manner, upon the request and at the expense, in all things, of the Defendant, (subject nevertheless as aforesaid,) grant and execute a lease to him of all that plot or parcel of ground, other part of the said lands of the Plaintiff, situate at *Worthing* aforesaid, as the same plot of ground was drawn and described upon and by the said agreement, to hold the same unto the Defendant, his executors, administrators, and assigns, for the term and at the yearly rents, and upon the conditions in the said agreement mentioned. And in consideration of the covenants and agreements in the said agreement contained on the part of the Plaintiff, the Defendant covenanted with the Plaintiff, that he the Defendant would, by or before the 24th of *June* 1828, at his own proper costs and charges,

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charges in all things, erect, build, and completely finish, fit for habitation, subject to the approbation of the Plaintiff, or his surveyor for the time being, six several messuages or dwelling houses, upon the six plots or parcels of ground firstly thereby agreed to be demised; and also fourteen several messuages or dwelling houses, upon the said plot or parcel of ground lastly thereby agreed to be demised, with suitable out-offices thereto respectively, according to the plan, elevation, and specification thereof respectively, annexed to the said agreement, and signed by the Plaintiff and the Defendant; and should and would complete the carcasses, and cover in all the before mentioned messuages or dwelling houses, by the 25th day of *December* then next. And by the said agreement (after further reciting that the Defendant having occasion to borrow and take up at interest the sum of 6000*l.* for the purpose of carrying on and completing the erection of the said several messuages and buildings, and having also occasion for the supply of a quantity of bricks and other materials for the purposes of such buildings, to be wholly expended and employed on the said estate, had requested the Plaintiff to advance and lend and supply the same, at the time and in the manner thereinafter mentioned, which the Plaintiff had agreed to do,) the Plaintiff covenanted with the Defendant, that he would advance and lend to the Defendant the sum of 6000*l.*, he paying interest for the same at and after the rate of 5*l.* per cent. per annum, such interest to be paid quarterly, and to be computed from the respective times of advancing the said sum of 6000*l.* thereinbefore mentioned, or any sum and sums in respect thereof, or as part thereof: the said sum of 6000*l.* to be advanced to the Defendant at the times and in manner following; (that is to say), the sum of 500*l.* in the

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The question of law raised on the part of the Defendant was, Whether the action was maintainable, the Plaintiff having contracted by the agreement to advance 6000*l.* to the Defendant at the times and in the manner therein specified, whereas he advanced only a part of the said sum of 6000*l.*? and if the action was maintainable, a further question was raised on the part of the Defendant, Whether the Plaintiff was entitled to recover all the four several sums of 1168*l.* 19*s.*, 107*l.* 14*s.* 8*d.*, 834*l.* 11*s.*, and 62*l.* 17*s.* 5*d.*? The arbitrator further found, that under the notice of set-off, the sum of 735*l.* 11*s.* 1*d.* was due from the Plaintiff to the Defendant; and that if the Court should determine the action to be maintainable for the full amount of the said four sums of 1168*l.* 19*s.*, 107*l.* 14*s.* 8*d.*, 834*l.* 11*s.*, and 62*l.* 17*s.* 5*d.*, then the arbitrator awarded that the said sum of 735*l.* 11*s.* 1*d.*, being the sum proved under the Defendant's set-off should be deducted therefrom, and that a verdict for the Plaintiff should stand, but that the damages, according to the former part of his award, should be reduced from 4000*l.* to the sum of 1438*l.* 11*s.*; or, if the Court should be of opinion that the action was not maintainable for the whole of the said four sums claimed by the Plaintiff, but only for part thereof, then he awarded and directed that the damages should be reduced to the sum for which the Court should determine the action to be maintainable after deducting therefrom the said sum of 735*l.* 11*s.* 1*d.*, the amount of the Defendant's set-off.

Wilde Serjt. for the Plaintiff. Although the whole sum which the Plaintiff engaged to lend was not advanced, yet the day for repayment being passed, *indebitatus assumpsit* lies for the sum actually lent. Where a party performs less than his contract, he may still

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still recover on a general count for so much as he performs, provided he do not sue before the time appointed for payment. That principle is established in *Oxendale* v. *Wetherell* (*a*), where, by a contract of sale, the vendor agreed to deliver 250 bushels of wheat within a specific time, and delivered part, but not the residue: it was held, that he might, after the time mentioned in the contract had expired, recover from the purchaser the value of the wheat delivered to and retained by him. In *Walker* v. *Dixon* (*b*), referred to in that case, the nonsuit was afterwards set aside. In *Waddington* v. *Oliver* (*c*), the action was commenced before the term for the delivery of all the goods contracted for had expired, and, consequently, before the stipulated time for payment.

[The Plaintiff abandoned the claim for interest on the amount due for materials.]

Spankie Serjt. for the Defendant. The question is, Whether the Plaintiff's demand resolves itself into money lent? for if it does, the action lies, otherwise not. Now the contract between these parties is complex; much is to be done on both sides, and it cannot be said that money has been lent till the whole is complete. The Defendant engages to build; the Plaintiff to furnish land and money in return; but at no time could it be said that the money, which the Plaintiff now seeks to recover on a count for money lent, was a simple loan to the Defendant. All the circumstances must be taken together, and the Plaintiff's only remedy is on the special contract. In *Cooke* v. *Munstone* (*d*), where the Plaintiff, having declared upon an agreement to de-

(*a*) 9 *B. & C.* 386.
(*b*) 2 *Stark. N. P. C.* 281.
(*c*) 2 *N. R.* 61.
(*d*) 1 *N. R.* 351.

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liver soil or breeze, with a count for money had and received, proved that the Defendant, having agreed to deliver soil, the Plaintiff paid *2l. 5s.* for earnest, but that the Defendant refused to deliver the soil, it was held, that he could not recover damages for the non-delivery on the first count, on account of the variance; nor the *2l. 5s.* upon the second, because the agreement was still in force.

In the cases cited on the other side, the special contract was clearly at an end; but the question must depend on the peculiar circumstances of each transaction.

TINDAL C. J. The rule is, that when there is a special agreement in existence, capable of being carried into effect, and containing any condition precedent to the Plaintiff's claim, he cannot resort to the general count. But there is no condition attached to the agreement between these parties. It is true the Plaintiff engages to lend 6000*l.*, but there is no condition that he shall be precluded from seeking payment unless the whole of that sum be advanced; and even if there had been any such stipulation, it has been waived by the parties, because after the Defendant had built the six houses, he was requested by the Plaintiff not to begin to build the fourteen, so that the security of that contract seems to have been rescinded by the consent of the parties. Looking at the circumstances of the case, even as stated by the counsel for the Defendant, they amount to no more than an agreement to repay money lent.

PARK J. I am of the same opinion. I think this is not an existing agreement: it was put an end to by consent, and the case cannot be distinguished from *Oxendale* v. *Wetherell.*

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BOSANQUET J. The Plaintiff could not have declared on this agreement, as it has been suggested he might have done, for the agreement was rescinded by mutual consent; for the money actually received, therefore, the Plaintiff was entitled to proceed on the common count.

ALDERSON J. concurred.

Judgment for Plaintiff.

DOE dem. CLARKE v. LUDLAM and Another.

Jan. 21.

THIS was an action of ejectment. At the trial of the cause before *Gaselee* J., *Lincoln* Summer assizes 1830, a nonsuit was entered, with liberty to enter a verdict for the Plaintiff, subject to the opinion of the Court on the following case: —

Since the statute 55 G. 3. c. 192., a copyhold will pass under a general devise of real estate, although there be no surrender to the use of the will.

On the 6th of *March* 1830, *George Ludlam*, late of *Crowle* in the county of *Lincoln*, being then seised in fee of a freehold estate at *Crowle*, and also of three copyhold messuages or dwelling-houses at *Crowle*, being part and parcel of the manor of *Crowle* in the said county, executed his last will, which, after several legacies, proceeded as follows: — "I give and bequeath unto my housekeeper *Mary Riggle*, of *Luddington* in the said county of *Lincoln*, the legacy or sum of 5*l.* I give and devise unto the said *Mary Riggle* the west end or part of my dwelling-house at *Crowle* aforesaid, now in the occupation of *Fanny Loughton*, to and for her use and during the term of her natural life; and at her decease I give and devise the same premises

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to my executor hereinafter named: and I direct that the legacies hereinbefore bequeathed shall be paid by my executor hereinafter named at the end of twelve calendar months next after my decease. I give, devise, and bequeath unto *John Clarke* of *Epsworth*, in the said county of *Lincoln*, the whole of my real and personal estates and effects whatsoever and wheresoever, which I may be possessed of at the time of my decease, subject to the payment of the legacies hereinbefore bequeathed, and to his heirs and assigns for ever; and I do hereby appoint the said *John Clarke* sole executor of this my last will, and revoke and make void all former wills and testamentary dispositions by me at any time before made, and declare this to be my last will and testament. In witness, whereof," &c.

The will was attested by only two witnesses. The testator died seised of the above freehold and copyhold estates, without having made any surrender to the uses of his will. *John Clarke*, the person named in the will as devisee and executor, and the lessor of the Plaintiff, in the present action, was a stranger in blood to the testator, but had intermarried with one of his nieces. The dwelling-house, of which the west end or part was specifically devised by the will to *Mary Riggle* for life, with remainder to the lessor of the Plaintiff, was one of the three copyhold messuages above mentioned.

By the custom of the manor, copyhold estates of intestates descend in like manner as freehold, and they were devisable by will previously to the act of 55 *G.* 3. *c.* 192. Surrender being made subsequently to the death of the testator, and prior to the day of the demise laid in the declaration, the lessor of the Plaintiff was admitted tenant to the copyholds in question, being the east end of the last mentioned dwelling house, and the other

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other two messuages as devised under the will. The Defendant, *John Ludlam*, was the heir-at-law, and customary heir of the testator.

The question for the opinion of the Court was, Whether or not the copyhold messuages mentioned in the will passed thereby to the lessor of the Plaintiff? and if the Court should be of opinion that the copyhold messuages did so pass to the lessor of the Plaintiff, the verdict was to be entered for the Plaintiff as aforesaid; but if the Court should be of a contrary opinion, then the nonsuit was to stand.

Wilde Serjt. for the Plaintiff. The copyhold messuages passed by the will. Before the statute *55 G. 3. c.* 192., if a testator, having freehold, and copyhold estate not surrendered to the use of his will, had devised all his real estate, the copyhold would not have passed at law, because, for want of a prior surrender, the will could not operate as an appointment of the use of the copyhold; and an intention could not necessarily be presumed to pass the copyhold under the term *real estate*, because there was freehold to which those words might apply. But if there had been no freehold, an intention to pass the copyhold must have been presumed, or the will would have been inoperative. So, if the testator had only an equitable interest in the copyhold, it would pass under a devise of all his real estate: *Car* v. *Ellison* (*a*): for as the surrender could only be made by the person having the legal estate the testator could not take that mode of shewing his intention. But now a surrender is supplied by the statute in every case. Every will of a testator possessing copyhold since the statute is a copyhold assurance

(*a*) 3 *Atk.* 73. See also *Hawkins* v. *Leigh*, 1 *Atk.* 387.

without

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without prior surrender; and if copyhold be real estate, it must pass in like manner as it formerly did when a testator had freehold, and copyhold surrendered to the use of his will, and devised all his real estates. To hold otherwise would greatly mislead testators, who, in consequence of the statute, may be induced to devise, in general terms, without a surrender, considering that no longer a necessary evidence of intention, or, if necessary, supplied by the statute. In *White* v. *Vitty* (*a*), Lord *Eldon* says, "As the act makes a surrender unnecessary for the devise of copyholds, it may be a question whether the surrender can now be considered as any evidence of an intention that copyholds should pass by the devise, since, under a will containing sufficient words to pass them, they would pass equally (as the law now exists), whether they were or were not surrendered."

If then a surrender be no longer evidence of an intention to pass copyhold, it seems to follow that the absence of a surrender is no evidence of a contrary intention.

Scriven Serjt. *contrà*. The object of the statute was, to supply a surrender; not to supply an intention. In cases, therefore, where, independently of a general devise of his real estate, a testator has expressed a clear intention to devise his copyhold estate, but for want of a surrender to the use of his will, such a devise would have been inoperative, the statute supplies a surrender, and the copyhold will pass; but the mere supplying a surrender will not pass the copyhold in cases where general words of devise alone being used, and there being freehold property to satisfy them, a surrender by

(*a*) 2 *Russ.* 439.

the

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the testator himself has been deemed the necessary evidence of his intention to pass his copyhold: as in *Chapman* v. *Hart* (*a*), *Byas* v. *Byas* (*b*), *Church* v. *Munday*. (*c*) In the absence of specific words of devise, nothing but a surrender can be evidence of an intention to pass copyholds; *Sampson* v. *Sampson* (*d*), *Lindopp* v. *Eborall* (*e*), *Judd* v. *Pratt* (*g*), *Wentworth* v. *Cox*. (*h*) The language of Lord *Eldon* in *White* v. *Vitty* is reserved and guarded. He says only that it *may* be a question. In *Car* v. *Ellison* the testator's intention plainly appeared. Here there is neither a complete disposition nor an expressed intention. To make the intention clear, something remains to be done, as in *Doe* v. *Bartle* (*i*), where a feme covert, with the consent of her husband, devised copyhold, but there was no surrender and separate examination of the wife, as the custom of the manor required. The Court held, that though the statute supplied the surrender, it did not supply the separate examination of the wife, and that, therefore, the copyhold did not pass. The Court will adhere to general rules of construction, and not disinherit the heir except upon intention clearly shewn. The testator here having devised a part of his copyhold specifically to *Mary Riggle*, has plainly shewed his intention not to devise the remainder.

Wilde in reply was stopped by the Court.

TINDAL C. J. I agree in the necessity of adhering to general rules in the construction of wills and other instruments. It is expedient that such rules should be

(*a*) 1 *Ves.* sen. 271—3.
(*b*) 2 *Ves.* 164.
(*c*) 12 *Ves.* 426.
(*d*) 2 *Ves.* & *B.* 339.
(*e*) 3 *Bro. C. C.* 188.
(*g*) 13 *Ves.* 176. 15 *Ves.* 394.
(*h*) 6 *Madd.* 363.
(*i*) 5 *B.* & *A.* 492.

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held sacred, because they withdraw the decision from the discretion of the individual judge, and prevent him from pursuing his own views of each particular case. And there is less inconvenience in the hardship which may sometimes be occasioned by a strict adherence to the rule, than in the confusion which must follow on departing from it. But there is no reason in the present case for departing from the general rule which was first laid down in *Rose* v. *Bartlett* (*a*), namely, "That if a man hath lands in fee and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years; and if a man hath a lease for years, and no fee simple, and deviseth all his lands and tenements, the lease for years passeth; for otherwise the will should be merely void." A rule which has been followed ever since. In *Chapman* v. *Hart*, the Lord Chancellor exemplifies the rule, by shewing what would be the case if a testator had copyholds. "Suppose a case of a person seised of freehold and copyhold in *D.*, who surrenders to the use of his will, and devises all his lands and tenements in *D.* to a child: there being a surrender, both freehold and copyhold would pass; to which *lands* and *tenements* generally mentioned shall be applied." But he says, that if the land had not been surrendered, the construction would be different. "Suppose that will executed in the presence of two witnesses, or of one only, those general words used, and no surrender, though this were to a child or wife, the Court would not supply the defect of the surrender to the use of the will, or compel the heir at law to surrender the copyhold to the devisee, because the will was not duly executed, when, if duly executed, the Court would not have supplied that defect." Now, we are called on to give

(*a*) *Cro. Car.* 292.

judgment

judgment in a case where that act, dehors the will, the act of surrender is divested of any importance. For by *55 G. 3. c. 192.* it is enacted, "That where any copyhold tenant may by will dispose of his copyhold tenements, the same having been surrendered to such uses as should be declared by the will, every disposition made by such will shall be as valid to all intents and purposes, although no surrender shall have been made to the use of the will of such person, as the same would have been if a surrender had been made." And so cautiously has the statute been framed, in order to give the fullest effect to the enactment, that by the third section it is provided, "That nothing herein contained shall be construed to render valid or effectual any devise or disposition of any copyhold lands, &c. which would be invalid or ineffectual if a surrender had been made to the use of the will of a person attempting to dispose of the same by a will;" clearly shewing that where surrender alone is necessary to the validity of the will, validity to that extent is supplied by the act. Here, therefore, if surrender be the only thing necessary to give validity to the will, should we not cripple the act if we were to require something more, and decide in favour of the Defendant? And see how this applies to the question of intention: before the act a surrender was held necessary as evidence of the testator's intention to devise. Since the act it is no longer necessary: what attorney, sitting by the bedside of a testator, would now hesitate to use the general words of a residuary devise, which before the act would have passed copyhold interest if they had been made the subject of a surrender. We should unnecessarily struggle against the statute if we were to decide in favour of the Defendant. Confining our decision, therefore, to the question arising on the statute, our judgment must be for the Plaintiff.

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PARK J. We are particularly anxious to confine our decision to the construction of the statute, which we should render nugatory if we were to adopt the arguments which have been urged on the part of the Defendant. The Court of King's Bench have shewn, in *Doe* v. *Bartle*, what they meant by determining, that in that case the surrender was matter of substance; and, on referring to the arguments of Lord *Tenterden* and Mr. Justice *Bayley*, it is impossible to doubt that we have adopted the right construction. They distinguish between matters of substance and formal acts. "The statute meant to supply the want of a surrender only in cases where it was a mere matter of form, and not where it was a matter of substance. Here the surrender, coupled with the separate examination, is a matter of substance. I am quite satisfied the legislature did not mean to take away that protection which such a surrender is calculated to afford to femes covert." But as we are required to supply a formal surrender only, our judgment must be for the Plaintiff.

BOSANQUET J. I am of the same opinion: the words of the residuary clause would have been sufficient to pass the copyhold before the recent statute, if there had been a surrender to the use of the will. Nothing then was wanted in addition to the will, to pass this property, but a surrender. That deficiency has been supplied by the statute which enacts, that where a copyholder may dispose of property having surrendered it to the use of his will, "every disposition made by such will shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the will of such person, as the same would have been if a surrender had been made." In this case, therefore, although there has been no surrender, the statute places the Plaintiff in the same situation; and as the

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the devise would have been clearly sufficient with a surrender, our judgment must be for him.

ALDERSON J. I entirely concur in the decision which has been pronounced. Before the act, copyhold property would not have passed under a general residuary devise of real estate if there had been no surrender to the use of the will. But when the statute has, in effect, supplied a surrender, the objection can no longer prevail, and that brings this case within the decisions which have determined that an equitable interest in copyholds would pass before the statute, even where there had been no surrender. The equitable owner of such property being no party to the legal surrender, his intention to pass copyhold might be as well inferred from the use of the words *real estate*, as his intention to pass freehold.

Judgment for the Plaintiff.

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Plaintiff placed in the hands of his agent *Neapolitan* bonds, with *coupons* or receipts for half-yearly interest payable to the bearer of the *coupon*: the *coupon* referred to a certificate which gave the holder the option of converting his bonds into funded debt: the interest was paid to holder of the *coupon* without production of the certificate, but the bonds were never sold in the market without the certificate: Plaintiff kept the certificates in his own hands, but his agent, without authority, and fraudulently, pledged the bonds to Defendant as a security for a debt: Held, that it was correctly left to the jury to determine whether these instruments passed by delivery, and whether Defendant had acted with due caution in receiving the *coupons* without requiring the certificate: the jury having found both questions in the negative, the Court refused to set aside a verdict for Plaintiff.

DEBT for money had and received to the use of the Plaintiff, with counts in detinue for certain *Neapolitan* bonds or *certificats de rente*.

The *Neapolitan* Government raised money by issuing certain obligations called *Bordereaux*, with *coupons* in the following form: —

"Bordereau of fourteen coupons of rentes.

"A. belonging to the certificate No. 14549. of the administration of *Naples*.

"Receipt for fourteen coupons of rentes belonging to certificate No. 14549.

"There shall be delivered to bearer against the present receipt, after that the coupons hereto annexed shall have become due up to the 1st *July* 1833, fourteen new coupons of rente for the successive periods of payment, for the amount of twelve ducats and fifty grains, inscribed in the great book of the kingdom of the *Two Sicilies*, under the names of our administration. *Naples*, the 1st of *July* 1826.

"(Signed) FALCONNET and Co.

"M. No. 403.

"(Signed) MEURIN ppr.

"A. No. 2.

"(Signed) SAUNELLO."

"Coupon,

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"Coupon, for twelve ducats and fifty grains of rente for the half year, expiring 1st *July* 1833, belonging to the certificate No. 14549. for twenty-five ducats of annual rente, inscribed in the name of our administration. This coupon is payable at *Naples* against the bearer's receipt, after recovery of the same half-year on our cumulative.

"Inscription, No. 283. *Naples*, the 1st *July* 1826.
"M. No. 5642.
"A. No. 2.
"For the administration.
"(Signed) FALCONNET."

"Coupon for twelve ducats and fifty grains of rente for the half year, due 1st *January* 1833, belonging to the certificate of No. 14549., for twenty-five ducats of annual rente inscribed in the name of our administration. This coupon is payable at *Naples* against the bearer's receipt, after recovery of the same half-year on our cumulative.

"Inscription, No. 283. *Naples*, the 1st *July* 1826.
"A. No. 2. M. No. 5641.
"For the administration.
"(Signed) FALCONNET, and Co."

Fourteen of these *coupons*, or receipts for half-yearly payments of interest, for fourteen half-years successively from the date of the bordereau, were set out in succession on the same sheet as the *bordereau;* one of them was cut off and given up to the *Neapolitan* government upon the receipt of each half-yearly payment, and when the whole fourteen were exhausted, upon the production of the *bordereau* at the head of them, the holder received a new *bordereau* with fourteen new *coupons.*

The holder of the original *bordereau* also received with it a certificate in the following form: —

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"Administration of the rentes of the kingdom of the *Two Sicilies*. A. ducats 25. Certificate No. 14549, ducats 25, at the rate of 4—40 livres. 110 of annual rente, to commence from the 1st of *January* 1818, good for twenty-five ducats inscribed in the great book of the kingdom of the *Two Sicilies*, in the joint names of *M. M. Jean Lewis Falconnet, Jean Sowillo, Charles Lowis Roulet, J. Bte. Bourgingnon, Achille Mewricoffre, Chas. Bonnette*, under the number of the order of payment 283.

"To the bearer:

"The proprietor will always have the power of converting the annuity of twenty-five ducats specified in this obligation, into inscriptions in the great book of this kingdom in his own name, or in the name of his nominees, upon causing this document to be presented to the administration by some person known at *Naples*; together with the orders for interest not due, and the receipt for procuring new orders after the payment of those first issued, and complying with the mode of transfer in use, at the direction of the great book of this kingdom. Made at *Naples* the 17th of *January* 1818. *Falconnett* and Co., *Mewricoffre*, *Sowillo*, and Co., *J. Bte. Bourgingnon*. N. B. There have been delivered with this certificate six orders for dividends, the last of which is payable the 1st of *January* 1821, as well as a receipt for obtaining six new orders for the succeeding dividends, No. 123. I, the undersigned director of the great book attest, that this present certificate of No. 25, ducats of annual rente, numbered 14549, is part of an inscription in the great book of the kingdom of the *Two Sicilies* D. 750., transferred No. 30. into the names above mentioned, and to the account numbered 283. The above-mentioned rente cannot be transferred anew but on the presentation of this certificate, in order that my signature may be cancelled.

"*Naples*, the 17th of *January* 1818. The directors of the great book, registered No. 4981.

"The LIQUIDATOR GENERAL."

It

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It appeared by the evidence of several brokers on the trial of this cause, that the *bordereaux* and *coupons* were never sold in the *English* market without the accompanying certificate, but that the holder of a *coupon* was entitled to receive the amount of that *coupon* when due, without producing either the *bordereau* or certificate; the *coupon* bearing some analogy to an *English* dividend warrant. In an answer to a bill filed against him in Chancery, the Defendant deposed, that he believed the *coupons* were often sold at the exchange distinct from the bonds.

Such being the nature of these instruments, the Plaintiff, who had purchased 100 of them, delivered his *bordereaux* and *coupons* in 1824 to *Watts*, a broker at that time of the highest respectability, in order to have the *coupons* renewed at *Naples*, keeping the certificates in his own possession.

Watts had for some years been employed by the Defendant to invest his money, and *Watts*'s usual course was, to allow the Defendant 3 per cent. on his deposits till an eligible investment could be found.

The Defendant having deposited a large sum for investment with *Watts* in *July* 1824, *Watts*, in *January* 1825, sent him the *coupons* which had been obtained from *Naples* for the Plaintiff, and deluded the Plaintiff by telling him from time to time that they were not yet arrived.

In *September* 1825 *Watts* absconded, insolvent, and was never heard of again.

The Plaintiff having traced the *bordereaux* and *coupons* to the Defendant, and still holding the original certificates, sought by this action to recover from the Defendant as well the *bordereaux* and remaining *coupons*, as the interest or dividends which had been received upon the *coupons* become due.

Tindal C. J., before whom the cause was tried, directed

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the jury to find, whether the *bordereaux* and *coupons*, without the certificates, passed in *England* from hand to hand like money or bank notes; and, whether the Defendant had acted with proper caution in taking the *bordereaux* without requiring the certificates to which they referred.

The jury found that the *bordereaux* did not pass like money, and that the Defendant had not acted with due caution in taking them without the certificates; and a verdict was thereupon found for the Plaintiff, which

Taddy Serjt. obtained a rule *nisi* to set aside, on the ground that the Chief Justice, upon inspection of the *bordereaux* and *coupons*, ought to have decided himself that the property in them, like that in bank notes, passed by delivery, and, if so, that the question about caution was irrelevant, no person being bound to enquire into the title to money, or to instruments passing from hand to hand in the usual course of mercantile business. In *Gorgier* v. *Mieville* (*a*), it was held that *Prussian* bonds, payable to the holder, passed by delivery in this country as bank notes.

Wilde and *Adams* Serjts. shewed cause. These instruments do not pass from hand to hand like bank notes or money, and the Defendant must bear the consequences of his want of caution in taking the *bordereaux* and *coupons* without requiring the certificates to which they refer. *Gill* v. *Cubitt* (*b*), *Snow* v. *Peacock* (*c*), *Down* v. *Halling* (*d*). Had they been a portion of the *British* circulation, the judge might, perhaps, have taken on himself to decide, whether they passed by delivery; but, being foreign securities, the usage of trade with respect to them, was a fact which

(*a*) 3 *B.* & *C.* 45.
(*b*) 3 *B.* & *C.* 466.
(*c*) 3 *Bingh.* 408.
(*d*) 4 *B.* & *C.* 330.

could

could only be found by the jury. The *coupons* are merely receipts to be given up when the sum named in them is paid. In *Gorgier* v. *Mieville*, the instruments were bonds payable to bearer; it was expressly proved that they passed from hand to hand in the market like exchequer bills, and the Court relied on that circumstance in discharging the rule for a new trial. Here it was proved that the *bordereaux* and *coupons* were never sold without the certificate, and the case rather resembles *Glyn* v. *Baker* (*a*), where it was held that property in *India* bonds did not pass by delivery, because there was no proof that they were negotiable, and no person could sue on them but the obligee.

Wilde also contended, that *Watts* having been a debtor of the Defendant's ever since *July* 1824, and having delivered the *bordereaux* and *coupons* to the Defendant in *January* 1825, not as an object of sale for money advanced at the time, but rather as a security for the debt already due from *Watts*, the Defendant had given no valid consideration for these instruments: a valid consideration, it was argued, could only consist of value given for the identical object taken in exchange: but the Court having expressed no opinion upon the point, it would be irrelevant to state the argument more at length.

Taddy, (*Bompas* and *Heath* Serjts. were with him,) *contrà*. These instruments are negotiable without the certificate, particularly where they are delivered, as in the present instance, by way of security. The certificate merely gives the holder of the *bordereau* an option to become a proprietor of *Neapolitan* stock to the amount of the *bordereau*, instead of being a proprietor of a portion of the circulating or floating debt of *Naples*.

(*a*) 13 *East*, 509.

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But the *bordereaux* and *coupons* are available for all purposes of money without that option; they give the holder a complete title to the half-yearly payments, and the option would be of no use to a pledgee, because he could only avail himself of the certificate by giving up the *bordereaux* and *coupons*. If they were negotiable, the holder might lawfully pledge them. In *Collins* v. *Martin* (*a*), *Eyre* C. J. said, "The property passing with the possession, it is admitted that a banker who receives indorsed bills from his customers, to be got in when due, and carried to his account, may discount or sell them: why may he not pledge them? Either is a breach of the confidence reposed in him: he may sell because the property has been intrusted to him; and he may pledge for the same reason." That case is confirmed in *Treuttel* v. *Barandon* (*b*), and in *Lickbarrow* v. *Mason* (*c*) it is laid down as "a broad general principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it." The sole question, therefore, is, whether this instrument passes from hand to hand by force of the instrument itself,—in other words, whether it is payable to bearer? and the question left to the jury, whether the Defendant used due caution, is inapplicable, for the same objection might be urged in the case of bills of exchange. Unless in the case of a purely commercial instrument, it is for the Court, not the jury, to decide its import; *Freemoult* v. *Dedier* (*d*); as, a cash note; *Grant* v. *Vaughan* (*e*) per *Wilmot* and *Yates* Js. In *Miller* v. *Race* (*g*), Lord *Mansfield* puts bank notes on the same footing as money, by reason of their currency. "It has been quaintly said," he ob-

(*a*) 1 *B. & P.* 651.
(*b*) 8 *Taunt.* 100.
(*c*) 2 *T. R.* 70.
(*d*) 1 *P. Wms.* 429.
(*e*) 3 *Burr.* 1528.
(*g*) 1 *Burr.* 457.

serves,

serves, "that money cannot be followed because it has no earmark: but that is not true; the true reason is on account of the currency of it." So, in *Wookey* v. *Pole* (*a*), *Best* J. says, "The representation of money which is made transferable by delivery only, must be subject to the same rules as the money which it represents." But if the Court, and not the jury, is to decide on the nature of *British* instruments, the representatives of money, no reason can be given why they should not equally decide on the nature of foreign instruments made payable to the holder, when evidence has been given that they are correctly translated. In *Gorgier* v. *Mieville*, the evidence as to the custom with respect to *Prussian* bonds was necessary, because a bond, though made payable to bearer, is not of itself, and in its own nature, a negotiable instrument; and that distinction disposes also of the case of *Glyn* v. *Baker*. But even in *Gorgier* v. *Mieville*, no evidence was given of the law of *Prussia* with respect to the bonds; and the Chief Justice said, "Whoever is the holder of the instrument has power to give title to any person honestly acquiring it."

TINDAL C. J. In this case two questions were left by me for the decision of the jury, and their finding is decisive, if either question was correct, and correctly left to the jury. I shall therefore confine myself to the first, because that will sufficiently warrant the judgment of the Court, not because I have any doubt on the second. The first question was, whether the instruments in dispute had acquired, from the course of dealing pursued in the city, the character of bank notes, bills of exchange, dividend warrants, exchequer bills, or other instruments, which form part of the currency of this country.

(*a*) 4 *B.* & *A.* 6.

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The general rule of law is, that if I confide property to an agent, and he disposes of it without authority, I may recover it in whatever hands it may be found.

There is an exception to this rule in favour of the ordinary currency of the country, which rests on the footing, that the rule would be inconvenient if it had the effect of impeding mercantile transactions.

It was proper, therefore, for the jury to say, what was the character of these *bordereaux* and *coupons*. Because, if they were merely in the nature of securities, as mortgage deeds and the like, the Plaintiff was entitled to recover; if the Defendant took them as negotiable instruments, he might be entitled to retain them.

It has been contended, indeed, that looking at the face of the instruments, the Judge ought to have taken upon himself to direct the jury that these were negotiable instruments. But had I taken on myself to decide one way or the other, I see nothing on the face of these instruments to lead me to infer they are negotiable instruments. First let us consider the *coupons*: they are receipts for consecutive half-yearly payments of the rentes of the *Neapolitan* government. Why am I to say that these receipts, running on for six or seven years prospectively, are necessarily negotiable instruments? I should rather say the contrary, because those which become due at remote periods detract from the value of those which are more immediately payable; the whole requires to be equalized by an allowance in the nature of discount; and it is impossible to say that such receipts can have a known rate of discount like bills of exchange. Then, the *bordereau* is only an undertaking on the part of the government of *Naples* to give new coupons when the present shall have run out. Why is that to be taken as money?

Therefore, even if it had been incumbent on the Judge to decide what was the nature of these instruments,

ments, there is nothing on the face of them to lead to the conclusion that they are to be considered as money or negotiable instruments. But the answer to the objection is, that these are not *English* instruments, recognised by the law of *England*, but *Neapolitan* securities, brought to the notice of the Court for the first time; and, as Judges, we are not allowed to form an opinion on them, unless supplied with evidence as to the law of the country whence they come. Judges have only taken upon themselves to decide the nature of instruments recognised by the law of this country; as bills of exchange, which pass current by the law merchant; dividend warrants; or exchequer bills, the transfer of which is founded on statutes which a Judge in an *English* court is bound to know. It has been urged, that in *Gorgier* v. *Mieville*, the case of the *Prussian* bonds, no evidence was given of the foreign law; but evidence was given, that by the usage of merchants in this country, those bonds passed from hand to hand, which usage could scarcely have existed, unless they were negotiable by delivery in *Prussia*, so that evidence as to the law of *Prussia* was rendered unnecessary. And the question is, not so much what is the usage in the country whence the instrument comes, as in the country where it is passed. That question I left to the jury in the present case; namely, whether in this country these *coupons* and *bordereaux* passed from hand to hand? and that was a point which it was incumbent on the Defendant to make out, since the general rule is, that the Plaintiff is entitled to pursue his property into whose hands soever it comes. But the evidence shewed, that at the time when these instruments were disposed of they were not regarded as money or as negotiable instruments. The jury having found that, the general rule must prevail, and the verdict for the Plaintiff stand.

PARK J.

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PARK J. It is not necessary to enter into the argument, whether the Defendant gave a good consideration for these instruments or not. The case turns on the single question, whether in taking them without further enquiry he proceeded with that reasonable caution which ought to exempt him from the Plaintiff's claim? It is clear that he is liable to that claim, if he proceeded without due caution. That is the rule in all the cases, from *Miller* v. *Race* to *Down* v. *Halling*. In *Peacock* v. *Rhodes* it was held, that this was properly to be left to the jury; and *Lawson* v. *Weston* (*a*) has been totally overturned by *Gill* v. *Cubitt*. The cases referred to differ only in specie; they all turn on the same principle; and the question is, not whether there has been any fraud or moral delinquency, but whether the party has conducted himself with sufficient caution? The banker who changed a 500*l.* note for a stranger in a small town, had no intention to assist in a fraud, but merely to circulate his own paper, but it was held, he had not proceeded with sufficient caution, and he was obliged to refund. In the present case, several experienced brokers gave evidence that there was no instance in which the *coupons* and *bordereaux* had passed without the certificate. But without that, one cannot fail to observe, that each of these instruments, on the face of it, refers to the other; and the director of the *Neapolitan* finances requires, that upon resorting to the certificate, the *bordereaux* and *coupons* shall be brought in and destroyed. That was enough of itself to invite enquiry. Suppose bills of exchange drawn in triplicate; would any man rely on one set without knowing what had become of the other two? I think the question here was rightly left to the jury, and that the jury have come to a right conclusion. The point has been much more

(*a*) 4 *Esp.* 56.

discussed

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discussed since Mr. Justice *Bayley* differed from the rest of the Court in *Wookey* v. *Pole* than it had been before.

BOSANQUET J. I am of opinion that there is no sufficient ground for objecting to the direction of the Chief Justice, or to the finding of the jury. Many questions have been raised, which it is not necessary for us to determine. The chief points are, Whether these instruments were negotiable, and whether the Defendant took them under circumstances which entitle him to retain them. It has been contended, first, that the nature of the instruments should have been determined by the Chief Justice, and not left to the jury. Now, these are instruments which, *primâ facie*, are not transferable to bearer, either by the custom of merchants, or by any statute. It was incumbent on the Defendant, therefore, to establish that, by the foreign law, these were negotiable instruments which passed on delivery. The evidence, however, is all the other way, and shews that these instruments were only transferable *sub modo*; that is, not separately, but one with the others. The case of *Gorgier* v. *Mieville* has been relied on for the Defendant, because there it was holden, that *Prussian* bonds were negotiable. By these bonds, however, the King of *Prussia* bound himself to the holder; and that was not deemed sufficient, for it was further proved that bonds of that description were sold in the market, and passed from hand to hand, and that circumstance was relied on by the Court. But admitting even that these instruments would pass from hand to hand, the other question left to the jury was a competent and an important question; namely, whether these instruments were received with that degree of caution which entitles the Defendant to hold them against a party who has been deprived of them by fraud. In the cases of bank notes, which unques-

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unquestionably pass by delivery, it has been deemed important to enquire whether notes of the amount which a party has received without enquiry are commonly negotiated in the part of the country where he received them; or, upon the particular occasion; as in the case of the note which was passed at *Doncaster* races. So in *De la Chaumette* v. *The Bank of England*, it was enquired, whether notes of the amount in question were usually passed in *France*. So in *Solomons* v. *The Bank of England*, whether such notes usually passed in *Holland*. It is urged, that in *Gorgier* v. *Mieville*, the Chief Justice said, that "whoever is the holder of the instrument has power to give title to any person honestly acquiring it." But, before the case of *Gill* v. *Cubitt*, the attention of the Courts had not been so much drawn to the point, that though an instrument be negotiable, it does not pass, if there be a want of proper caution on the part of the taker. Here, we are to consider whether these instruments were taken under circumstances which entitle the holder to retain them. The Defendant is a merchant, and his agent was broker in extensive business. The Defendant, therefore, must be taken to know the usage of trade, and that usage was to transfer all the instruments together; and as the *coupons* refer to the certificates, it was for the jury to consider whether there was reasonable caution in taking the *coupons* without requiring the certificates. The observation that the party who enables another to commit a fraud ought himself to be the sufferer, does not apply to the Plaintiff; for he kept the certificates in his own hand as a check upon his broker.

ALDERSON J. I am of the same opinion. The principle laid down in *Miller* v. *Race* is "Money cannot be followed on account of the currency of it. It cannot be recovered after it has passed in *currency*." Setting out from

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from that as the true principle, let us examine whether these instruments were taken in the course of currency. Now, as the *bordereau* was a foreign security, it was incumbent on the Defendant to enquire into the course of currency respecting it, and it appears that the course is not to take the *bordereau* without the certificate. I think, therefore, that evidence was properly received on this point, and that the jury have come to a correct conclusion.

Upon the second question, Whether the Defendant used due caution in taking these securities, it is plain, that if he had asked for the certificate the whole fraud would have been prevented; but he omitted to do so, and it was properly left to the jury to say whether he had acted with sufficient caution. When he took the *bordereau*, it was natural to ask, "Where is the certificate to which this belongs?" And the jury, who are more conversant with mercantile instruments, were of that opinion. As to the argument, that the Defendant trusted his broker, and was not acquainted with the nature of the instruments, if he chooses to go into the market without such knowledge, I am not prepared to say he uses due diligence to discharge himself from the consequences.

Rule discharged.

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Jan. 25. CARLISLE, Assignee of G. V. LEONARD, a Bankrupt, *v.* GARLAND.

A sheriff's officer seized goods under a *fi. fa.* and packed them up. The execution was afterwards abandoned, on an agreement that the Plaintiff in the action should receive goods for his demand instead of money. A portion of the goods, however, which had been seized, were afterwards sent by the under-sheriff's agent to the sheriff's officer to hold till the Plaintiff should pay him the expenses of the levy. The Plaintiff afterwards paid the officer, and the goods were forwarded to the Plaintiff: Held, a sufficient conversion to render the sheriff liable in trover to the assignees of the Defendant in the action, who had become bankrupt upon an act of bankruptcy committed before the execution.

TROVER, for goods seized under an execution by the Defendant as sheriff of the county of *Dorset*. At the trial, *Dorchester* Summer assizes 1826, it was found by a special verdict, that *George Valentine Leonard*, being a trader, &c., on the 15th of *October* 1824, committed an act of bankruptcy, on which a commission was afterwards issued against him. That on the 15th of *December* in the same year, a writ of *fieri facias* issued out of the Court of King's Bench, tested the last day of *Michaelmas* term preceding, returnable on *Monday* next after eight days of *St. Hilary* then next, and directed to the sheriff of *Dorset*, commanding him to levy of the goods and chattels of the said *G. V. Leonard* a debt of 604*l.* which *Joshua Payne* had recovered against him in the Court of King's Bench, with 65*s.* for his damages, &c. Which writ was endorsed to levy 306*l.* 1*s.* 6*d.*, besides sheriff's fees, poundage, officers' fees, and all other incidental expenses. On the 16th of the same month, the writ was delivered to Mr. *William Parr*, at that time under-sheriff to the Defendant, who was then sheriff of *Dorset*, by *John Williams*, an agent of the said *Joshua Payne*; together with the following letter from *Green* and *Ashurst*, his attornies: —

"Sir, — The bearer, Mr. *Williams*, will deliver a writ of *fieri facias* to you which we have issued against the goods of Mr. *G. V. Leonard*, and upon which you will

be

be pleased to grant a warrant to an officer living near to *Lyme*. We authorize you and the officer to take Mr. *Williams*'s directions on the subject of this execution, and to withdraw from possession, if he shall think fit to request you so to do. We are, &c. *Green* and *Ashurst*."

On the 17th of that month the Defendant issued his warrant directed to *William Restarick*, his bailiff, reciting the writ, and commanding him to levy of the goods and chattels of the said *G. V. Leonard* as required by the said writ, that the said sheriff might have the money as by the same he was commanded. That warrant was delivered by *Williams*, the agent of *Joshua Payne*, to *Restarick*; together with the following letter from *Parr*, as under-sheriff to *Restarick*:—

"*Poole*, 16 *Dec.* 1824. *Payne* v. *Leonard*.

"Sir,—Enclosed is a warrant to levy on the Defendant's property, which I send you by Mr. *Williams*, whose directions you will take in the execution of the warrant; and if he requests you to withdraw the execution, you will do so on his giving you a written authority. *W. Parr*."

Restarick, on the 17th of *December*, entered *Leonard*'s house at *Lyme* in the county of *Dorset*, and there seized and took divers goods in the declaration mentioned, which were the goods of *Leonard* at the time of his bankruptcy, of the value of 450*l.* under and by virtue of the same writ, putting *Robert Gascoigne*, his assistant, in possession, and leaving with him the warrant; *Gascoigne* kept possession of the same till the 24th of the same month. Whilst *Gascoigne* was so in possession as the assistant of *Restarick*, divers goods, parcels of goods in the declaration mentioned of the value of 445*l.*, which were the goods of *Leonard* at the time of his bankruptcy, were made up into thirteen packages,

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packages, which *Restarick* understood were packed for the purpose of satisfying the levy in pursuance of an arrangement made between *Williams* and *Leonard*, eight of them to pay the debt due from *Leonard* to *Payne*, and the remaining five of them to be sold by *Payne* for the sheriff's poundage, officers' fees, and other expenses which *Williams*, as such agent, should have incurred or might incur in and about the levy, the surplus balance to be remitted to *Leonard*. After such arrangement had been so made between them, on the 24th of *December*, *Williams* delivered to *Restarick* two letters, one dated the 23d day of *December*, signed by *Leonard*, and directed to *Restarick*, as follows: — "I request and empower you to take goods instead of cash to the amount of the levy in the above cause." And the other dated *Lyme* 24th of *December* 1824, and signed by *Williams*, as follows: — "I hereby authorize and request you to quit possession, the Plaintiff having been satisfied the whole debt and costs in this action." The execution was afterwards on that day wholly abandoned; and *Gascoigne* and *Restarick* quitted the premises of *Leonard*, leaving all the goods thereon. Two hours after, *Williams* came to *Restarick* at a neighbouring inn to settle with him for the sheriff's poundage, and *Restarick*'s expenses for inventory, holding possession, levying, and other expenses; which were then adjusted except 5*l.*, as to which *Williams* and *Restarick* agreed, that *Williams* should cause goods to the amount of 5*l.* to be packed up and sent to *Bridport* to *Restarick*, to be deposited with and kept by him till the 5*l.* should be remitted to him. A quantity of goods of the value of 5*l.*, being the residue of the goods mentioned in the declaration, was accordingly fetched from the shop of the bankrupt by a shopman of the bankrupt, and was on the 26th of *December* received at *Bridport* by the *Lyme* carrier. The 5*l.* was, about two months after,

after, paid to *Restarick*, who forwarded the package of goods, about the same time that the money was paid, by the van to *Payne* in *London*. *Restarick*, at the time he received the goods, knew that they were part of the goods which had been so seized ss aforesaid. The said thirteen packages of goods were, after the execution was so abandoned as aforesaid, on the same day sent by *Williams*, as such agent as aforesaid, from the house of *Leonard* to the *Cob* at *Lyme*, each of them being marked with the letters *J. P.*, as the initials of *Joshua Payne*'s name, and thence shipped for *London*, addressed to *Smith*'s wharf, and directed by *Williams* to be sent to 34. *Old Change*, for *Joshua Payne*. They were landed, on their arrival in *London*, at *Smith*'s wharf. On the 8th of *January* 1825, a commission of bankrupt issued against *Leonard*, under which he was, on the 14th of the same month, declared a bankrupt. On the 29th of the same month an assignment of the estate and effects of the bankrupt was made by the commissioners under the said commission to the Plaintiff. In the beginning of *February* 1825, the Plaintiff's agent asked the wharfinger at *Smith*'s wharf to deliver the said packages of goods, which he refused until it was ascertained in a court of law to whom they belonged. On the 15th of *June* 1825, at *Poole* in *Dorsetshire*, the Plaintiff demanded the goods mentioned in the declaration of the Defendant, who referred him to Mr. *Parr*, his undersheriff. The Plaintiff soon after, seeing the Defendant and Mr. *Parr* together at *Poole*, asked Mr. *Parr*, in the presence of the Defendant, whether it was his intention to comply with the terms of the same demand or not; to which Mr. *Parr* answered, "Certainly not."

Bompas Serjt. for the Plaintiff. If there was a conversion of these goods by the sheriff, he is liable in

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trover to the assignees under the commission issued on an act of bankruptcy committed prior to the levy, whether he knew of the act of bankruptcy or not. *Lazarus* v. *Waithman* (*a*), *Price* v. *Helyar* (*b*), and the cases there cited. The only question, therefore, is, whether there was any conversion. Now the sheriff, having by the note of the under sheriff, authorised *Williams* to regulate the execution, the transfer of the goods under the arrangement between *Williams* and the bankrupt for the purpose of securing *Payne*'s debt with the sheriff's poundage and officer's fees, amounted to a conversion of the goods by the authority of the sheriff, the sheriff's officer allowing them to be packed up while in his custody, and afterwards retaining part of them as a security for the payment of his own fees. *Wyatt* v. *Blades* (*c*), *Hurst* v. *Gwennap* (*d*). The Court here called on

Peake Serjt. for the Defendant, who stated that, in this cause, it had originally been intended to reconsider the decision in *Cooper* v. *Chitty* (*e*), but since the verdict, the point in dispute had been settled in this Court by the case of *Price* v. *Helyar*, and it would not be decorous to impugn, here, so recent a decision. *Cooper* v. *Chitty*, however, when rightly understood, determined, that under circumstances like those of the present case, the sheriff, though liable in trover for the conversion of the bankrupts goods, was not liable for the mere seizure under the *fi. fa.* And in the present case there was no conversion by the sheriff. The sheriff's officer was authorised to withdraw, by *Williams*, the Plaintiff's agent, and the sheriff is not responsible for what was done by

(*a*) 5 *B. M.* 313.
(*b*) 4 *Bingh.* 597.
(*c*) 3 *Campb.* 396.
(*d*) 2 *Stark.* 306.
(*e*) 1 *Burr.* 20.

Williams

Williams after the officer was gone. In *Wyatt* v. *Blades* the sheriff refused to deliver the goods while they were yet in his possession.

Bompas. The under-sheriff, by his letter to the officer, adopted all the acts of *Williams;* and, at all events, the officer's fees were paid by a portion of the goods: that is a clear conversion by the sheriff.

TINDAL C. J. The statement of facts on this special verdict, shews a sufficient conversion to entitle the Plaintiff to sustain an action of trover, supposing the sheriff liable to such an action. I look only to the conversion, because the other point has been so recently determined in this Court, and the Court of Exchequer, that if the Defendant is anxious to discuss it again, it will be better he should resort to a court of appeal. Here, a letter from the under-sheriff authorises *Restarick* to levy on *Leonard*'s goods the amount endorsed on the writ, at the suit of *Payne,* and to pursue the instructions of *Williams, Payne*'s agent. *Restarick* enters; puts *Gascoygne* in possession, and while he is in possession, thirteen packages are made up for the purpose of satisfying *Payne*'s debt: another is afterwards added on the authority of *Williams.* What becomes of the goods so taken? A distinction is made between the packages; one of them gets to *Restarick* at *Bridport,* and the rest ultimately find their way to *London.* Upon the whole, the sheriff having received the benefit of one of those parcels in discharge of his poundage, and having been instrumental and assenting to the packing up of the others, must be considered a principal in the transaction. I am of opinion, therefore, that there has been a sufficient conversion to raise the question, if the party chooses to carry it farther.

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PARK J. I concur as to the conversion, and upon the other point it is not necessary to pronounce an opinion, although nothing which has been urged to-day has induced me to doubt the authority of the cases which establish the sheriff's liability.

BOSANQUET J. I am of the same opinion, and consider the Court bound by the decisions as to the responsibility of the sheriff, upon which decisions, although it is unnecessary to express an opinion, I am not disposed to cast any doubt. As to the conversion, the sheriff has been a party to all that has been done, and has exercised a control over the goods to secure payment of the poundage. That amounts to a sufficient conversion.

ALDERSON J. The sheriff involves himself in all the acts of *Williams*, who has clearly converted the property, and I think has converted it as agent of the sheriff.

Judgment for Plaintiff.

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DOBSON *v.* FUSSY and Others.

Jan. 25.

In justification of an assault, the Defendants pleaded, that they were duly assembled as a select vestry, and extruded the Plaintiff, being an intruder. One of the select vestry having received no notice of the meeting, Held, that the justification was not made out.

ASSAULT and battery.

The Defendants pleaded the general issue; and by a second plea, that before the committing the supposed trespasses, to wit, on, &c. at, &c. the inhabitants of the parish of *Sproatley*, then in vestry assembled, did duly and according to the form of the statute in such case made and provided, establish a select vestry for the concerns of the poor of the said parish, and to that end did then and there duly nominate and elect in the same vestry such and so many substantial householders and occupiers within the said parish, not exceeding the number of twenty, nor less than five, as were in such vestry thought fit to be members of the said select vestry, to wit, *Thomas Dibbs*, *Edward Barber*, *Robert Fussy*, *George Caley*, and *John Williamson*; that afterwards and before the committing the supposed trespasses, to wit, on, &c. at, &c. the said persons so nominated and elected as aforesaid, were duly appointed by writing according to the said act, under the hand and seal of one *Christopher Sykes*, clerk, he, the said *C. Sykes*, then and there being one of his majesty's justices of the peace in and for the county of *York*; that the Defendants, before and at the time when, &c. were overseers of the poor of the said parish of *Sproatley*, and that afterwards and before the time when, &c. to wit, on, &c. a select vestry of the said parish was duly assembled and holden in a certain convenient place within the said parish, to wit, in a certain school-room within the said parish, touching the care and management of the concerns of the poor of the said parish, according to the said act; at which select vestry the said Defendants, as overseers of the poor of the said parish were present; that just before the time when, &c. and whilst

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the said select vestry was duly holden and sitting in the said school-room on parochial business as aforesaid, to wit, on, &c. the Plaintiff unlawfully entered and came into the said school-room, and then and there made a great noise and disturbance therein, and stayed and remained therein making such noise, without the leave or licence and against the will of the said select vestry so assembled as aforesaid, and thereby then and there greatly disturbed and disquieted the Defendants and the other persons then and there composing the said select vestry as aforesaid; and thereupon the Defendants being such overseers, and two of the select vestry so assembled as aforesaid, then and there requested the Plaintiff to cease from making his said noise and disturbance, and to go and depart from and out of the said school-room, which the Plaintiff then and there wholly refused to do; whereupon the Defendants, to prevent such interruption as aforesaid, and to force and compel the Plaintiff to quit and leave the said school-room, at the said time when, &c. quietly laid their hands on the Plaintiff, in order to remove, and did attempt to remove the Plaintiff from and out of the said school-room; and thereupon the Plaintiff then and there forcibly and violently resisted the Defendants, and then and there unlawfully attempted to stay and remain in the said school-room; and it then and there became and was necessary to use force and violence for the purpose of removing the Plaintiff from and out of the said school-room, and thereupon the Defendants did then and there seize and lay hold of the Plaintiff by the collar of his coat, and pulled and dragged about the Plaintiff, and gave and struck the Plaintiff the blows and strokes in the declaration mentioned, and forced, pushed, pulled, dragged, and drove the Plaintiff from and out of the said school-room in the said school-house or building, and necessarily and unavoidably gave the Plaintiff the other blows and strokes in the declaration mentioned,

as

as it was lawful for them to do for the cause aforesaid, doing no unnecessary damage or injury to the Plaintiff on that occasion.

The third plea stated,

That the Defendants and divers other persons composing part of the said select vestry of the said parish, before and at the said time when, &c. were lawfully possessed of a certain school-room, part and parcel of the said school-room or building in the declaration mentioned; and being so possessed thereof, the Plaintiff just before the time when, &c., to wit, on, &c. was unlawfully in the said school-room, and with force and arms making a great noise and disturbance there, and at the said time when, &c. staid and continued there, making such noise and disturbance, without the leave or licence and against the will of the Defendants and divers other persons composing part of the said select vestry as aforesaid, and then and there greatly disturbed and disquieted the Defendants and the said other persons in the peaceable and quiet possession and enjoyment of the said school-room; and thereupon the Defendants then and there requested the Plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said school-room, which the Plaintiff then and there wholly refused to do; whereupon the Defendants, in defence of the possession of the said school-room, and to force and compel the Plaintiff to quit and leave the said school-room, at the same time when, &c. in the said count mentioned, gently laid their hands upon the Plaintiff, &c.

At the trial before *Tindal* C. J., last *York* assizes, it appeared that the vestrymen named in the second plea, with the exception of *Dibbs*, were assembled on a special occasion, and on an unusual day, in the school-room of the parish of *Sproatley*, to discuss parish business; that no notice of the meeting had been given to *Dibbs*, although the others had been duly summoned; and that

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the Plaintiff, not being a select vestryman, and endeavouring to force himself into the room, was violently thrust out by the Defendants.

Tindal C. J. thought the Defendants had not made out their allegation that they were assembled as a select vestry, *Dibbs* never having received any notice of the meeting; and the Plaintiff obtained a verdict.

Jones Serjt. obtained a rule *nisi* to set aside the verdict, against which

Wilde Serjt. was about to shew cause; but the Court called on

Jones to support his rule. As against a wrongdoer it was sufficiently shewn that the Defendants were assembled in vestry. It would be of the worst consequence if persons acting in a public and official capacity should be subject to insult and outrage, and be debarred redress if there happen to be any informality in the mode of calling them together. In similar cases, as in proving the authority of constables and others, it has always been held sufficient to shew that they *act* as such, without proving the correctness of their appointment. As against a wrong-doer it is sufficient to shew that the Defendants were *acting* as vestrymen. If it were otherwise, there would be no means of protecting them from intrusion for the interval between the arrival of the first vestryman and the last necessary to form a *quorum*; for, strictly speaking, they are not a vestry till that number is assembled. At all events, the proof given was sufficient under the third plea, which does not allege that the select vestry were *duly* assembled.

TINDAL C. J. The question on the first special plea is, Whether the Defendants have made out the allegation that they were a select vestry duly assembled. The

The introduction of select vestries is of recent date. They were first established by 59 *G.* 3. *c.* 12., which enacts, "That it shall be lawful for the inhabitants of any parish, in vestry assembled, and they are hereby empowered, to establish a select vestry for the concerns of the poor of such parish; and to that end, to nominate and elect, in the same or in any subsequent vestry, or any adjournment thereof respectively, such and as many substantial householders or occupiers within such parish, not exceeding the number of twenty nor less than five, as shall in any such vestry be thought fit to be members of the select vestry; and the rector, vicar, or other minister of the parish, and in his absence the curate thereof (such curate being resident in and charged to the poor's rates of such parish), and the churchwardens and overseers of the poor for the time being, together with the inhabitants who shall be nominated and elected as aforesaid (such inhabitants being first thereto appointed by writing under the hand and seal of one of his majesty's justices of the peace, which appointment he is hereby authorized and required to make), shall be and constitute a select vestry for the care and management of the concerns of the poor of such parish, and any three of them (two of whom shall neither be churchwardens nor overseers of the poor) shall be a quorum; and every such select vestry shall meet once in every fourteen days, and oftener if it shall be found necessary, in the parish church, or in some other convenient place within the parish." What then is to bring them together? we should look primarily at what was the custom in this respect before. The mode of bringing a general vestry together is regulated by 58 *G.* 3. *c.* 69., namely, by four days' notice affixed to the church door; and without saying that those regulations are to be applied to select vestries, they afford a reason for thinking that *some* formal mode must be pursued to bring a select vestry together. If they had agreed to meet every day in the week, that, perhaps,

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perhaps, would have been sufficient; so, if they had met and had adjourned to a given day: but in the present case a meeting has been called on special business, on an unusual day, and we are called on to say that the meeting was legally convened, although one of the vestrymen had received no notice that it would take place. Such a decision would lead to great inconvenience and mischief, enabling perhaps three to meet to the exclusion of the remaining seventeen, and adopt resolutions in which the majority would never have concurred. By analogy to the rules which prevail in summoning the members of a corporation, it is impossible to hold this meeting as a legally constituted vestry. It has been urged, however, that the second special plea does not allude to the vestry *so* assembled; but it refers without qualification to the vestry mentioned in the first special plea, and therefore incorporates the allegation that it was legally assembled. If it be taken otherwise, the Defendants are out of Court on that plea, for unless the nature of the meeting entitled them to exclude the Plaintiff, there is nothing to shew that he was a wrongful intruder. The rule, therefore, must be discharged.

PARK J. On looking at the first special plea, I entertain no doubt on this case, for the Defendants allege that they were assembled as a select vestry, and it turns out that they were not a select vestry, and the case is the stronger against them as they were not assembled on the general day of meeting. If they choose another day for special purposes, it is impossible to say they are duly constituted unless notice of the meeting be served on all. To hold otherwise would lead to enormous mischief, and all sorts of jobs. The allegations in the first special plea as to the constitution of the vestry, are drawn by reference into the second special plea.

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BOSANQUET J. I am of the same opinion. On the first special plea, the question is, Whether the allegation that the Defendants were duly assembled as a select vestry, has been made out. As they were assembled not on the general day of meeting, but on a particular day and for a special purpose, they should have proved the notice, without which they could not be assembled as a vestry. The sort of notice is not material; but some notice should have been shewn, and it is admitted that one of them received none. As to the second special plea, the reference to the said vestry described in the first special plea must be taken to mean the vestry as there described: if not, it can only mean that they were members of the vestry accidentally assembled in the same room. But unless they were acting in the character of a vestry legally assembled, they have shewn no authority to exclude the Plaintiff. The plea is not adapted to meet the argument that they were entitled to exclude the Plaintiff if they were only assembled ostensibly as a select vestry, or before they were all duly assembled.

ALDERSON J. I am of the same opinion. It may be that under the second special plea the Defendants are not so strictly bound to shew that they were duly assembled, as under the first special plea; but unless they shew that, they shew no right to turn the Plaintiff out; for the room appears to have been a parish school-room, into which, for aught that appears, the Plaintiff had as much right to enter as the Defendants. I entirely concur in the observations which have been made on the inconvenience that might be occasioned by allowing the select vestry to meet without notice. The minority might come to resolutions without the majority; or the majority without the minority, who, if they had been present, might have dissuaded or deterred them from such a course.

Rule discharged.

Jan. 26.

KAY *v.* GROVER and Another.

Under a warrant against the goods of *A.*, the Defendant, an overseer, took goods already in the hands of the bailiff of *A.*'s landlord, as a distress for rent: Held, that the Defendant was not protected by the sixth section of 24 *G.* 2. *c.* 44.

THE Plaintiff had taken, under a distress for rent, certain goods belonging to his tenant *Hoare*, and kept a bailiff in possession of them a considerable time, with a view, as he alleged, to spare his tenant the loss which would ensue on a sudden sale by auction.

While the goods were so in the custody of the Plaintiff's bailiff, the Defendants, overseers of the parish, imagining there was some collusion between the Plaintiff and *Hoare* to save *Hoare* from the payment of poor-rates, obtained a distress warrant from a magistrate, and seized as a distress for poor-rates due from *Hoare*, the goods already in custody of the Plaintiff's bailiff, notwithstanding the magistrate, who had heard something of the circumstances, cautioned them against taking goods already under distress.

The Plaintiff thereupon, without demanding a perusal or copy of the magistrate's warrant, brought this action to recover damages, and having obtained a verdict for 42*l.* at the trial before Lord *Tenterden* C. J. last *Hertford* assizes,

Andrews Serjt. obtained a rule *nisi* for a new trial, on the ground that the verdict was against the evidence; or to enter a nonsuit, on the ground that under the statute 24 *G.* 2. *c.* 44. *s.* 6. the Defendants were not liable to an action unless the Plaintiff had demanded a perusal or copy of the warrant.

Wilde Serjt. shewed cause. This is not a case within the statute, the object of which was to protect the officer where the magistrate ought to be responsible. But the magistrate

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magistrate could never have been responsible here, for he was bound upon application to grant the warrant of distress for poor rate due from the tenant; and it is not his fault if the officers, disregarding the authority given them by the warrant, take the goods of the landlord instead of the goods of the tenant. In *Parton* v. *Williams* (*a*) a constable, acting under a warrant commanding him to take the goods of *A.*, took the goods of *B.*, and the Court were clearly of opinion that the constable not having acted in obedience to the warrant, which directed him to take the goods of *A.*, the magistrate could not be responsible; and therefore there was no necessity for demanding a copy of the warrant.

Andrews. If the constable perversely takes the goods of the wrong person, it is clear he is not protected: the question is, whether he acts honestly to the best of his judgment; if so, he is entitled to protection. In *Parton* v. *Williams*, *Bayley* J. says, "When a constable is acting *bonâ fide*, and with an honest opinion that he is discharging his duty, and that he is acting at the very time in obedience to the warrant of a magistrate, I am of opinion that he is entitled to the protection of the eighth section of the statute." If so, there seems to be no good reason why he should not be protected under the sixth also.

TINDAL C. J. This rule has been obtained on two grounds: first, that within the effect and operation of the statute 24 *G.* 2. *c.* 44. *s.* 6. the Plaintiff is not entitled to recover, because there has been no demand of a perusal and copy of the warrant under which the Defendant acted.

Secondly, that the verdict is against the evidence.

(*a*) 3 *B.* & *A.* 330.

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As to the first objection, looking at the statute, it seems to us that it applies only to cases in which there is a defect of jurisdiction in the magistrate who grants the warrant, and the officer has acted strictly in obedience to the warrant. Before the passing of that statute the consequences of a want of jurisdiction in the magistrate who issued the warrant often fell on the officer, who was bound to obey it. It was therefore provided that "no action be brought against any justice, constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until demand hath been made of the perusal or copy of the warrant," &c.; and it then directs that if any action shall afterwards be brought against such constable without making the justice a defendant, the constable, upon producing the warrant at the trial, shall be entitled to a verdict, notwithstanding the defect of jurisdiction in the justice; and that if the action be brought jointly against the justice and the constable, then, on proof of the warrant, the jury shall find for the constable, notwithstanding the defect of jurisdiction. That enactment cannot apply here, where the magistrate has issued a legal warrant, and the case falls within the rule laid down in *Parton* v. *Williams*, where it was held that a constable who under a warrant from a magistrate takes the goods of *A.* instead of the goods of *B.*, is not within the sixth section of the statute.

PARK J. I am of the same opinion. It is admitted that the Defendant is entitled to the protection of the act, if his case falls within it. But it does not fall within the act, because the sixth section is intended to protect the officer only where the magistrate would have

have been liable, and the officer has acted strictly pursuant to the warrant. The magistrate would not have been liable here, for he could not refuse to grant the warrant, and he warned the party by saying, "Take care not to take goods under distress." The case, therefore, cannot be distinguished from *Parton* v. *Williams*.

ALDERSON J. (*a*) I am of the same opinion. The sixth section of the act entirely differs from the eighth, and bears a different construction. The object of the sixth section is only to protect the constable, where the magistrate has no jurisdiction. If the party had sued the magistrate and constable, a verdict must have been found for the magistrate, as he was bound to grant the warrant, and the constable must have been excused, because he was bound to execute the warrant. It is impossible to consider such a case within the purview of the act. The point has already been decided in *Crozier* v. *Cundey* (*b*), where a constable having a warrant to search for certain specific goods, alleged to have been stolen, found and took away those goods, and certain others also, supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant; it was held that the constable was liable to an action of trespass, although no copy of the warrant had been demanded. *Bell* v. *Oakley* (*c*) is to the same effect. In *Sly* v. *Stevenson* (*d*), it was holden that a constable who delivers a copy of his warrant to the party grieved, cannot thereby discharge himself, unless the party has a right of action (supposing the warrant illegal) against the magistrate under whom

(*a*) *Bosanquet* J. was absent.
(*b*) 6 *B.* & *C.* 232.
(*c*) 2 *M.* & *S.* 259.
(*d*) 2 *Carr.* & *P.* 464.

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he acts. If the Defendant in the present case had delivered a copy of the warrant, the Plaintiff would have had no action against the magistrate.

Rule discharged.

Jan. 26.

PRICE *v.* SEVERN.

An importunate beggar having refused to quit the Defendant's premises, the Defendant ordered him to be apprehended by a constable, which was done, and he remained in custody one night at an inn; the next day he was brought again before the Defendant, who told him he might have two sovereigns or go before a magistrate; the beggar stipulated for something more to pay his charges at the inn; Defendant gave him half-a-crown and some refreshment, and the beggar departed. Having afterwards sued the Defendant for the imprisonment, and the jury having given 100*l.* damages, the Court granted a new trial.

THIS action was brought to recover compensation in damages for an assault and false imprisonment; the Defendant pleaded not guilty; and the cause was tried before *Gaselee* J. at the last *Northampton* assizes. It appeared that the Plaintiff, a man in low circumstances, claimed relationship with the wife of the Defendant, who had been recently high sheriff for the county of *Northampton*. The Plaintiff went down from *London* to *Northamptonshire*, and applied at the Defendant's house for pecuniary assistance. Becoming unreasonable in his demands, he was warned off the premises. He still, however, continued his importunities, and having refused to quit the premises, the Defendant directed a constable to take him into custody. This order the constable obeyed, and the Plaintiff was taken to an inn for the night. On the following morning he was again brought to the Defendant, and after some little conversation, said he must have some money. The Defendant said he would ask Mrs. *Severn* about that — went away — and returned in a few minutes with two sovereigns, which he told the Plaintiff he might take or go before a justice: the Plaintiff consented to take the money, but said, at the same time, that he must have something for the keep of his horse. The Defendant then gave him half-a-crown, and directed the butler to furnish some refresh-

refreshment. The butler did so, in the housekeeper's room, and the Plaintiff went away. When he was first taken into custody the constable put handcuffs on him, but immediately afterwards removed them; and there was no evidence to shew that they had been put on by the Defendant's order. *Gaselee* J., in summing up the evidence, told the jury, that as the Defendant had not pleaded accord and satisfaction, the evidence as to the money given to the Plaintiff, and accepted by him, must be taken as going only in reduction of damages, and the verdict must be for Plaintiff; but it would be for the jury to say how much more he was entitled to upon the evidence they had heard. The jury returned a verdict for 100*l.* The learned Judge, on reading the report, stated, that a verdict for a shilling would have met the justice of the case.

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Goulburn Serjt. obtained a rule *nisi* for a new trial, on the ground that the damages were excessive.

Adams Serjt., who shewed cause, expressed apprehensions for the functions of jurymen, the liberty of the subject, and the integrity of *Magna Charta*, if this rule should be made absolute: contending, that in actions of *tort*, especially in those which concerned the liberty of the subject, the Courts would not disturb a verdict, unless the damages given were evidently grossly disproportioned to the cause of complaint. It could not be said that such was the case in the present instance. The violation of the Plaintiff's liberty was gross and wanton, and the payment of two sovereigns, instead of being a circumstance in mitigation, was a circumstance in aggravation of damages; for that money was offered, accompanied by a threat, that if it were not taken, the Plaintiff must go before a magistrate, and therefore was accepted under duress. He deprecated

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the notion that the damages for an insult of this kind should be estimated according to the station in life of the party aggrieved, and cited *Bruce* v. *Rawlins* (*a*), *Redshaw* v. *Brooke* (*b*), *Sharpe* v. *Brice* (*c*), *Fabrigas* v. *Mostyn* (*d*), *Huckle* v. *Money* (*e*), *Duberley* v. *Gunning* (*g*), *Merest* v. *Harvey* (*h*), and other cases, to shew the unwillingness of the Courts to interfere with the amount of damages in cases of *tort*, even where the plaintiff, as in *Huckle* v. *Money*, has moved in a humble sphere of life.

Goulburn, in support of the rule, admitted, as far as this verdict was concerned, all the law in all the cases referred to, which he, therefore, conjectured the learned Serjeant must have cited for the purpose of airing his case roll. No doubt, the Courts would not interfere unless the damages were outrageous, but such they were in the present case, even according to the estimate of the Plaintiff himself, who, when he was offered the two sovereigns, demanded something more for the expense of his horse, and upon receiving that went away satisfied.

TINDAL C. J. I think this case ought to be submitted to another jury. I offer no comment on the cases which have been cited, and would detract nothing from their authority. I am as little disposed as any man to interfere with the province of a jury, and I should not be induced to send a case down again for excessive damages except where those damages are enormous and disproportionate. I consider them such in this case on account of the limit which the Plaintiff himself put on his demand in the first instance. On the

(*a*) 3 *Wils.* 61.
(*b*) 2 *Wils.* 405.
(*c*) 2 *Bl. Rep.* 942.
(*d*) 2 *Bl. Rep.* 929.
(*e*) 2 *Wils.* 205.
(*g*) 4 *T. R.* 651.
(*h*) 5 *Taunt.* 442.

morning

morning after the detention, he seems to have thought himself well off with the two sovereigns and half-crown which the Defendant gave him; and there is nothing like duress in the case; for after he had received the sovereigns he stipulated for a further sum to defray the expense of his horse, and having received it, went to the Defendant's housekeeper's room, where he was supplied with refreshment. It seems to me, that if accord and satisfaction had been pleaded, it would have been a bar to the action. A verdict for 100*l.*, as we cannot but see on the evidence of the Plaintiff himself, is far beyond what he merits. The case, therefore, must go before another jury.

PARK J. I am surprised that it should have been supposed the Court has any wish to interfere with the due province of the jury. I agree with all the cases which have been cited, and the principle laid down by Mr. Justice *Yates* in *Bruce* v. *Rawlins*, that "the case must be very gross, and the damages enormous, for the courts to interpose." In *Duberley* v. *Gunning* the jury thought that the plaintiff had not connived at the dishonour of his wife, and therefore increased the damages on account of the foul and slanderous defence. The Court is attempting nothing in this case which is not usual, and the only question is, whether these damages are excessive and enormous? I am clearly of opinion they are, on the Plaintiff's own shewing, and we are not doing away with juries by ordering a new trial, but only sending the case to another jury. There can be no question that the degree of insult may vary according to the station in life of the party. That was held in the case of striking off the hat; an act, which in one station might be no more than a frolic, in another, an insult calling for damages.

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BOSANQUET J. concurred, but gave no further opinion, having heard the report only, and not the argument.

ALDERSON J. Every case of this kind must depend on its own circumstances. The case of *Huckle* v. *Money* was decided at a time of great political excitement. The government were on one side; a journeyman printer on the other; and the Court refused to set aside a verdict in favour of the printer, in order to shew their sense of the illegality and mischief of general warrants. But nothing is more usual than in cases of assault, where an excessive verdict has been given, to suggest to the counsel to agree on a sum, to prevent the necessity of a new trial.

To take the circumstances of this case: the Defendant having been greatly importuned by the Plaintiff, orders him to be taken into custody; and for that, no doubt, he is responsible. The Plaintiff having been detained at an inn all night, comes the next morning, asks for money, which he obtains; and after further importunity goes away satisfied on receiving 2*s.* 6*d.* more, and refreshment at the Defendant's house. The Plaintiff has set the measure on his own damages, and therefore this rule must be made

Absolute.

Jan. 26.

GODDARD *v.* HARRIS.

A clergyman arrested in his way to the altar, is entitled to be discharged.

THE Defendant, a clergyman, was arrested by the sheriff's officer under a writ of *ca. sa.* when he was going to the altar to officiate.

Peake Serjt. obtained a rule calling on the Plaintiff to shew cause why the Defendant should not be discharged,

charged, and the Plaintiff pay the costs of the application. By 9 *G.* 4. *c.* 31. *s.* 23. it is enacted, that "if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the Court shall award."

Wilde Serjt., as to the costs, shewed cause on an affidavit which made it doubtful whether the Plaintiff or his attorney had sanctioned the arrest; and as to the discharge, argued that though the Plaintiff or his agents might be subject to a penalty for violating the statute, it did not follow that the Defendant was entitled to his discharge.

TINDAL C. J. This rule must be made absolute; and the only question is, whether to the full extent or not. The statute 9 *G.* 4. *c.* 31. *s.* 23. makes an arrest under circumstances like those which appear on these affidavits, such an abuse of process that the Court will summarily interpose. But as it does not clearly appear to me that the arrest in the chapel was authorized by the Plaintiff or his attorney, the rule must be absolute without costs.

PARK J. agreed that the Defendant was entitled to his discharge, but thought that the Plaintiff and his attorney were sufficiently shewn to have authorized the arrest, and ought therefore to be liable to costs.

BOSANQUET J. I think the rule should be made absolute, because the arrest is an indictable offence; but without costs, because the concurrence of the Plain-

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tiff or his attorney does not appear to me to be clearly established.

ALDERSON J. concurred in making the rule absolute without costs.

Rule absolute accordingly.

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DOE dem. WHITAKER *v.* HALES.

The attorney for the mortgagee, who was also attorney for the mortgagor, having applied to the occupier of the land for rent to pay the interest of the mortgage with, and having threatened to distrain, Held, that the mortgagee could not treat the occupier as a trespasser, and eject him on a demise anterior to the application by his attorney as above.

EJECTMENT. The demise was laid on the 25th of *December* 1829.

At the trial before *Bosanquet* J., *Salop* Summer assizes 1830, it appeared, that some years before, *Austen* had mortgaged the premises in question to the lessor of the Plaintiff. A witness who described himself as attorney for the lessor of the Plaintiff as well as for *Austen*, said, "The lessor of the Plaintiff directed me to apply to *Austen* for the interest, and I applied to the Defendant in *April* 1830 for rent to pay the interest. I told him if he did not pay the rent I should take the steps the law allowed: I believe I threatened to distrain if the rent were not paid. I had received rent from the Defendant four or five times: I had an account with *Austen:* I paid the lessor of the Plaintiff his interest, and retained the remainder on *Austen*'s account to me. I never had any authority from the lessor of the Plaintiff to receive rent for him. I received the rent on account of *Austen:* I distrained for *Austen*, and by his authority."

The learned Judge said that this application made by an agent of the lessor of the Plaintiff to the Defendant in *April* 1830, was an acknowledgment that the Defendant was not at that time a trespasser, and, therefore, could

could not have been such on the day of the demise, *December* 25th 1829; whereupon the Plaintiff was nonsuited.

Russell Serjt. moved for a rule *nisi* to set aside the nonsuit, on the ground that the Defendant's money had been received as rent due to the mortgagor, out of which the agent had taken upon himself to defray the mortgagee's interest: that the Defendant having been all along considered as tenant to the mortgagor, the mortgagee had a right to treat him as a trespasser; and that, at least, it should have been left to the jury, whether the Defendant paid the money in the character of tenant to the mortgagee.

Wilde Serjt. shewed cause. It is not necessary for the Defendant to contend that he has been adopted as tenant to the mortgagee, or to refer to the cases on that point. If the mortgagee has recognized him as being legally in possession, he cannot afterwards treat him as a trespasser, and serve him with an ejectment, without a previous notice to quit, or, at least, a demand of possession. It is immaterial, therefore, in the present case, whether the Defendant were tenant at will or by sufferance, or merely exempted from the consequences of a trespass by an implied licence from the mortgagee. The mortgagee is bound by the act of his attorney, and if his attorney knowing all the circumstances of the parties, obtains money from the occupier on account of the mortgage, that amounts to a recognition by the mortgagee that the occupation is not a trespass.

Russell. The attorney's receiving money of the occupier does not amount to such a recognition unless he receives it as rent claimed by the mortgagee; here the money was claimed and received as rent due to the

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mortgagor. The occupier must shew some title in answer to the title set up by the mortgagee. But he is not so much as tenant at will. In *Birch* v. *Wright* (*a*) *Buller* J. said, "He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee, I mean in ejectments brought for the recovery of the mortgaged lands. The reason is, because the mortgagee, so long as he receives his interest, is virtually, and in the eye of the law, in possession. He has a right to the actual possession; whenever he pleases he may bring his ejectment at any moment that he will." How then can the occupier defend upon title without any legal interest in him? The terms of the consent rule are, that the Defendant shall confess lease, entry, and ouster, and insist only upon title. The title is the only matter that can come in question in ejectment. In *Pope* v. *Biggs* (*b*), *Littledale* J. says, "When a mortgage is executed, the mortgagee becomes the legal owner of the land, and is entitled to immediate possession, or to the rents and profits." The same point is established in *doe d. Fisher* v. *Giles*. (*c*) In *doe d. Roby* v. *Maisey* (*d*) Lord *Tenterden* says, "The mortgagor is not in the situation of tenant at all, or at all events he is not more than a tenant at sufferance; but in a *peculiar character*, and liable to be treated as tenant or as trespasser at the option of the mortgagee." Nothing but receipt of rent, *as* rent paid to the mortgagee, can prevent the mortgagee from recovering possession.

TINDAL C. J. The question is, Whether *Hales* was a trespasser on the 25th of *December* 1829. This is an action of trespass and ejectment, and the lessor of the

(*a*) 1 *T. R.* 383.
(*b*) 9 *B. & C.* 253.
(*c*) 5 *Bingh.* 421.
(*d*) 8 *B. & C.* 767.

Plaintiff

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Plaintiff is not entitled to recover, unless he shews that the Defendant was a trespasser on the day of the demise. To shew that he was not a trespasser on the 25th of *December* 1829, the Defendant proves that in *April* 1830 he was in possession of the premises, and that an agent of the lessor of the Plaintiff called on him, demanded payment of interest on a mortgage to the lessor of the Plaintiff, and received money *eo nomine* as interest, the Defendant being required to pay it instead of rent to the mortgagor. This, therefore, was a demand made by the agent of the mortgagee and with full knowledge of all the circumstances of the parties; namely, that the Defendant was tenant to the mortgagor, and not to the lessor of the Plaintiff; and if a party employs an agent who has full knowledge of circumstances, it must be presumed the principal has the same knowledge. So that the lessor of the Plaintiff, having recognized and availed himself of the possession of the Defendant so late as *April* 1830, cannot treat him as a trespasser in 1829. If the case had gone to the jury, as it might have gone, had the counsel for the lessor of the Plaintiff insisted on it, they must have come to the conclusion that here was a recognition of the lawfulness of the Defendant's possession.

PARK J. concurred.

BOSANQUET J. The question which has now been raised on the part of the lessor of the Plaintiff, might, no doubt have been left to the jury; but I interposed, and said, that without deciding whether the Defendant had been adopted as tenant to the lessor of the Plaintiff, yet that he could not be considered as a trespasser from *December*, when his possession had been recognized in *April* following. The witness said, "I told *Hales* if he did not pay the rent, I should take the steps the law allowed:

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allowed: I believe I threatened to distrain if the rent were not paid." There was no privity between the lessor of the Plaintiff and the Defendant, and on what ground could he call on him for money except as being legally in the possession of the premises?

ALDERSON J. If the demise had been laid subsequently to *April* 1830, the question which it was proposed to leave to the jury at the trial might have been very material. But the question here is, not whether the Defendant was tenant to the lessor of the Plaintiff, but whether he had been recognised by him as being in the legal occupation of the land; and if he had been so recognized, the lessor of the Plaintiff could not treat him as a trespasser. Suppose the mortgagor had gone to the Defendant in company with the mortgagee, had demanded the rent, and had immediately paid it over to the mortgagee as interest. If the mortgagee knew that at that time the Defendant was in possession of the land, and signified no dissent, is it lawful or just that he should afterwards treat the Defendant as trespasser *ab antecedente?*

The Defendant is entitled to his judgment of nonsuit, whether the attorney's evidence shews him to be a tenant to the lessor of the Plaintiff, or only legally in possession of the premises since *December*.

Rule discharged.

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Lord VERULAM *v.* HOWARD.

Jan. 27.

In settling the value of a copyhold fine, the tenant is not concluded by the amount of rent he may have reserved on the premises, but may shew their value to be less.

ASSUMPSIT for a copyhold fine due to the Plaintiff as lord of the manor of *Gorhambury*, in respect of copyhold premises belonging to the Defendant. The Plaintiff claimed 200*l.* as two years' value of the premises, a public house, called the *Leathern Bottle*; and proved that the Defendant had let it by auction for a term of eight years, at a rent of 112*l.* a year.

Conflicting evidence, however, was given as to the yearly value; the mode of occupation had varied; and witnesses for the Defendant said, that unless the premises were occcupied as a public-house, they would be worth much less than 100*l.* a year.

The jury were directed by Lord *Tenterden*, who tried the cause, to find for the plaintiff if they thought the fine did not exceed two years' improved value of the premises.

A verdict having been found for the Defendant,

Wilde Serjt. moved for a rule *nisi* to set it aside, on the ground that the Defendant, after letting the premises by auction for 112*l.* a year, was estopped to say they were not worth 100*l.* a year.

Andrews Serjt. shewed cause. The jury were competent to find the value of the premises, and there is nothing in their finding incompatible with the reservation in the Defendant's lease. The value may have fallen since that lease was granted, and there could be no certainty that they would be occupied as a public-house to the end of the term. If they should not be so occupied, the value, according to the evidence, would be much less than the rent reserved. In *Halton* v. *Hassel*,

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Hassel (*a*), Lord *Hardwicke* was of opinion, "the fine should be set according to the present improved value, which is all the lord has to look after."

Wilde. In *Halton* v. *Hassel* the rent was but 16*l.*, and the premises were of the yearly value of 50*l.* Here the lord seeks no more than the tenant has admitted to be the value. The Court presumes the fine to be reasonable till the tenant has shewn the contrary. *Denny* v. *Lemman.* (*b*)

TINDAL C. J. The jury, by finding a verdict for the Defendant, have in effect said, that they do not consider the annual value of the premises to amount to the rent reserved by the lease, for they were directed to find for the Plaintiff, if they thought the fine did not exceed two years' improved value of the premises. The question for us is, whether a lease, granted by the Defendant, being in existence, the amount of rent reserved by that lease is to be deemed conclusive. We are not prepared to say, that such ought to be the result. The reservation was, no doubt, weighty evidence against the Defendant, but it was for the jury to determine what effect they would give to that evidence, and what the law has laid down as the amount of a reasonable fine, is, not two years' rent but two years' value of the premises, of which the jury are the proper judges. If the rent reserved in a lease were to be deemed conclusive, a lease of much shorter duration than the present, — as a lease for two years, — would be entitled to have the same effect as a lease of longer duration, although at the end of two years the property might be of less value than at the time of granting the lease. In *Halton* v. *Hassell*, the rent reserved by the tenant was 16*l.*; the lord shewed the annual value to be 50*l.*, and Lord *Hardwicke* said,

(*a*) 2 *Str.* 1042. (*b*) *Hob.* 135.

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"the present improved value is all the lord has to look after." If the lord is not estopped by the amount of rent, neither is the tenant. And the annual value means the fair annual average value during the whole period over which the fine is to extend.

In the present case there was evidence of different modes of enjoying the property, which might cause the value to vary. I cannot say the jury were wrong, and think the rule should be discharged.

PARK J. concurred.

BOSANQUET J. The fine was assessed at an assumed value of 100*l.* a year. The jury find that the property was not worth so much; but how much less, does not appear. The rule must be discharged.

ALDERSON J. concurring, the rule was

Discharged.

RHODES *v.* INNES.

Jan. 28.

Where the father eluded service of process, service on the son, who said his father was in the house and should receive the writ, Held equivalent to personal service of the father.

A RULE had been obtained in this case to set aside the appearance entered by the Plaintiff for the Defendant, the declaration, and all subsequent proceedings, on an affidavit by the Defendant that he had never been *served* with process.

Wilde Serjt. shewed cause on an affidavit that the Defendant had long been eluding service, and that the writ, enveloped in a letter, was at length served at the Defendant's house on his son, who was told what the envelope contained. The son said his father was in the house,

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house, and should receive the writ. *Wilde* contended this was equivalent to personal service.

E. Lawes Serjt. *contrà*. The Plaintiff is not allowed to enter an appearance for the Defendant under the statute 12 *G.* 1. *c.* 29. except upon affidavit made and filed of the personal service of the Defendant. Service on the son cannot be deemed a personal service on the father; it would not be sufficient to warrant an attachment, and is not sufficient under the statute.

TINDAL C. J. This motion has been made on the 12 *G.* 1. *c.* 29., which enacts, "That if the defendant shall not appear at the return of the process, or within four days after such return, it shall be lawful to and for the plaintiff, upon affidavit being made and filed in the proper court of the personal service of such process, to enter a common appearance or file common bail for the defendant;" and the question is, whether there has been an affidavit of personal service of the writ, or what is equivalent. There is no magic in the word *personal*, and if a party by his conduct or agreement chooses to waive personal service, a service less strict may be sufficient. Has there not been virtually a personal service here? The clerk endeavours to see the Defendant, but an interview is eluded by a trick between the father and son. That strictly personal service is not always required, appears from the case of *Smith* v. *Wintle* (*a*), where the plaintiff put a copy of the writ through the crevice of the door, and seeing the defendant within, near the crevice, told him what the paper was. The Court held the service sufficient, and the defendant was not allowed to shut the plaintiff out by a trick on the technical meaning of the word *personal*.

(*a*) *Barnes*, 292.

So

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So here the son was served, and promised to convey the writ to his father, and when the father seeks to set aside the service, he ought to shew what the son did with the writ. But he merely swears, vaguely, that he was not *served*, not that he never saw the writ, and for aught that appears, the son might have put it in the fire on a sign made by the father.

PARK J. When it was known that a service on the son in the presence of the father was sworn to, it should at least have been shewn by the son that he did not deliver the writ to his father according to his engagement. If the Court sees a fraud, they will not permit the Defendant to elude service by a trick on the construction of the word *personal*. The case in *Barnes* is in point.

BOSANQUET J. If the son carried the writ as he was desired, and the father instructed him to put the writ on the fire, there was a sufficient personal service. And when the son is not brought forward to state what became of the writ, the Court cannot avoid seeing that the whole was a trick to elude personal service.

ALDERSON J. The Defendant must have known the contents of the paper, and has only not actually received the writ, because he did not choose to receive it. But that is not a sufficient ground for us to set aside the proceedings.

Rule discharged.

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Where the question was, whether a slip of land between some old enclosures and the highway, vested in the lord of the manor or the owner of the adjoining freehold, Held, that evidence might be received of acts of ownership by the lord of the manor on similar slips of land not adjoining his own freehold, in various parts of the manor.

EJECTMENT for certain cottages in the parish of *Gissing*, *Norfolk*.

At the trial before *Littledale* J., last *Norfolk* assizes, it appeared, that in 1805, one *Lingford* enclosed a portion of a green, or slip of waste land, lying between the high road and an old enclosure in the parish of *Gissing*, belonging to Lord *Orford*; built a cottage thereon; and then mortgaged the whole to the testator of the lessor of the Plaintiff.

In 1815 *Lingford* built a second cottage on the same slip.

The road was skirted on both sides by slips of green, or waste land, from these cottages, for several hundred yards, nearly up to a bridge where the old enclosures converged to the sides of the road, and the greens terminated in a point.

A few yards beyond the bridge the fences of the old enclosures receded again, and the road was again skirted by greens of the same description, which ultimately terminated in a large common.

With the exception of the piece of land belonging to Lord *Orford*, between which and the high road the cottages in question were built, the old enclosed land on both sides of the road, from the cottages in question to within a few yards of the bridge before mentioned, belonged to the Defendant. Beyond the bridge, the old enclosed land on both sides the road belonged to various other persons.

In 1819 *Lingford* became lunatic, and the Defendant, who, as lord of the manor of *Gissing*, claimed the land on which the cottages stood, received the rent of them from the occupiers till the year 1828, when the present ejectment was commenced.

The

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The Defendant, in order to support his claim, shewed various acts of ownership exercised by him from time to time on the greens or waste lands by the side of the road from the cottages in question up to the bridge; and then proposed to shew similar acts of ownership on the greens and wastes beyond the bridge, and in various other parts of the manor.

Littledale J. however refused to admit evidence of these acts beyond the bridge, the Defendant being no further the owner of the adjoining enclosed lands; and conflicting evidence of acts of ownership over the spot in question by Lord *Oxford* and those under whom the lessor of the Plaintiff claimed, being adduced on the part of the Plaintiff, a verdict was found for him, which,

Wilde Serjt. obtained a rule *nisi* to set aside, on the ground that the evidence tendered by the Defendant ought not to have been rejected, he claiming as lord of the manor, and the spot in question having been part of the waste.

Jones Serjt. shewed cause. The evidence was properly rejected. Evidence of acts of ownership over lands other than the land in dispute, can only be admissible after a foundation is laid for it by shewing that both portions are in the same predicament, — both affected by the same rights, — and the Defendant offered no such prelimary evidence here; nothing to connect the waste which skirted the land of others with the waste which skirted his own land. In *Stanley* v. *White* (*a*), before evidence was admitted of acts of ownership on lands other than those in dispute, it was shewn that the whole originally formed part of a belt surrounding an entire property. So in *Tyrwhitt* v. *Wynne* (*b*), where the issue

(*a*) 14 *East*, 332. (*b*) 2 *B* & *A*. 554.

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was whether certain common land were the soil and freehold of the lord of the manor or of the Plaintiff, it was held that leases of minerals &c. granted by the lord to other persons in other parts of the unenclosed waste lands were not receivable in evidence, unless it were first shewn that the *locus in quo* formed part of one entire waste to which those leases were applicable. Such preliminary evidence is the more necessary, because the presumption is, that waste land which adjoins a road belongs to the owner of the adjoining enclosed land, whether he be a freeholder, leaseholder, or copyholder, and not to the lord of the manor. *Doe d. Pring* v. *Pearsey* (*a*), *Hollis* v. *Goldfinch*. (*b*)

Wilde, contrà, was stopped by the Court.

TINDAL C. J. The only question for our decision is, Whether the evidence offered by the Defendant has been improperly rejected; and, on the best consideration I can give the point, I think the rejection was premature. Upon the effect of the evidence, I offer no opinion; but, such as it was, it ought to have gone to the jury. The contest was respecting the right to a slip of land between some old enclosures and the highway; whether it was vested in the owner of the adjoining freehold, or in the lord of the manor. It is well known that all grants of land are supposed to have come originally from the lord of the manor, as the grant to the lord is said to have come from the crown; and the point to be ascertained is, whether the grantee of the lord enclosed to the edge of his grant, or left an interval between his enclosure and the boundary line of his grant. If he enclosed less than the whole extent of his grant, and left an interval, the spot in dispute belongs to the

(*a*) 7 *B.* & *C.* 304. (*b*) 1 *B.* & *C.* 205.

Plaintiff;

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Plaintiff; if he enclosed to the extent of his grant, the interval in question belongs to the lord. It seems that the legal presumption is in favour of the grantees of the adjoining land, for when the lord claims the interval he is commonly called on to shew acts of ownership to support his claim. Now is evidence of that kind to be confined to the spot in question, or extended to acts on similar lands within the same manor? It seems that, within the rule established by *Stanley* v. *White*, such extended evidence is admissible. Where the land is all within the same manor, and the question with respect to these unenclosed slips is the same throughout, namely, whether they formed part of the original grant from the lord or not, I see no ground why evidence of acts of ownership, upon one part of such lands, should be excluded in a question of title as to another part. It is well known that, in questions of right of common, evidence of feeding, on any part of the common, may be shewn. But enclosure is a much stronger act of ownership than feeding: why then should not evidence be admitted of acts of enclosure in other open places of the same manor? When we are interpreting the supposed original grants over the whole of the manor, why may we not enquire what has been done with the consent of the grantees, in all other parts as well as the spot in question? If we were to reject such evidence, it might come to this, — that though evidence might be forthcoming of enclosure of frontages by the lord in every other part of the manor, yet he might lose the spot in question if the assertion of his right there had been accidentally omitted. In the present case, evidence of such acts in places other than the spot in dispute, has been admitted up to a certain limit; but, beyond that limit, it has been rejected as to other places within the same manor. I think such evidence was admissible, and therefore the rule for a new trial must be made absolute.

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PARK J. concurred.

BOSANQUET J. I am of opinion that this rule should be made absolute. Where evidence is offered of acts done in places other than the place in dispute, it is for the Judge to decide, in the first instance, whether there is such a unity of character in the different parts, as to render evidence, affecting a part not in dispute, admissible with reference to the part in dispute, and whether the acts relied on amount to evidence of ownership. It appears to me that this case satisfies both those conditions. There is a slip of waste land adjoining the land of the lord; then an interruption of the slip, and then a renewal of it at a little distance adjoining the lands of strangers; but the circumstance that all are within the same manor gives them a general unity of character. The evidence as to the various parts may not be of the same force, though it appears to me that acts of enclosure by the lord in parts of the waste adjoining the property of strangers afford more cogent evidence of the lord's title to the slips than acts of a similar kind in parts adjoining his own land. On the other hand, distance from the spot in question may weaken the effect of the evidence. But all this is matter for observation to the jury. The evidence is at all events admissible, if the places to which it relates are connected by a general unity of character.

ALDERSON J. I am also of opinion that this evidence ought not to have been rejected; upon the effect of it, when produced, I pronounce no opinion. If it could be clearly seen that the evidence, when admitted, would produce no difference in the result, the Court might refuse any further investigation; but it must be a strong case to justify the refusal of a new trial, where evidence has been rejected which ought to have been admitted.

Rule absolute.

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HENSHALL *v.* MATTHEW.

Jan. 29.

Judgment cannot be entered up after death of Plaintiff, on a warrant of attorney authorizing him to enter up judgment to secure the payment of 200*l.* to Plaintiff, *his executors* and assigns.

IN *October* 1819 the Defendant executed a warrant of attorney, empowering the Plaintiff to enter up judgment against him for 400*l.*; and by a memorandum it was stated, that the object of the warrant was to secure to the Plaintiff, his heirs, executors, administrators, and assigns, the payment of 200*l.*

The Plaintiff died in *November* 1820.

Jones Serjt., on the part of his executrix, moved to enter up judgment on this warrant, on the ground that as it was given expressly to secure a sum to the Plaintiff and his executors, it must be intended that the executors might enter up judgment as well as the testator. In *Coles* v. *Haden* (*a*), upon a warrant to enter judgment at the suit of *Coles*, his heirs, executors, or administrators, the Court allowed judgment to be entered up by the executor.

TINDAL C. J. In that case the terms of the warrant were express, that the judgment should be entered up by the plaintiff or his executors. Here the warrant authorises the Plaintiff alone to enter judgment, and then gives the proceeds according to the distribution of law.

Rule refused.

See *Fendall* v. *May* (*b*), *Cowie* v. *Allaway* (*c*), *Wild* v. *Sands*. (*d*)

(*a*) *Barnes*, 44.
(*b*) 2 *M.* & *S.* 76.
(*c*) 8 *T. R.* 257.
(*d*) *Str.* 718.

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Jan. 29. BUTT Demandant, NOEL and Wife Deforciants.

Parties may insist on having the indentures of a fine made to agree with the concord, by the insertion of all limitations of legal estates contained in the concord.

THIS was a fine *sur cognisance de droit* of lands which the deforciants were described in the concord to hold for the life of the wife; with remainder to the husband for life, if he should survive his wife; with remainder to *F. Gates* and his heirs during the lives of the husband and wife, and the life of the survivor of them; with remainder to *G. C. Agar* and Lord *Winchelsea* for a term of 500 years, to be computed from the decease of the survivor of the husband and wife; with remainder after the expiration of the said term, and subject thereto, to the first and other sons of the husband and wife in tail male; with remainder to the daughters of the husband and wife, as tenants in common in tail general, with cross-remainders between them; with reversion in fee to the demandant.

In the indentures the chirographer had struck out the remainders to *Gates*, *Agar*, and Lord *Winchelsea*, as unnecessary to the due operation of the fine.

In the deed to lead the uses there was a covenant to levy a fine of the reversion.

Russell Serjt. moved that the indentures of the fine might be made in pursuance of the concord and of the limitations therein contained, alleging, that unless this were done, the covenant to levy a fine of the reversion would not be fully performed. He stated, that *Buller* J. had made a similar order when he sat in this court.

TINDAL C. J. We see no objection, as the limitations are all, strictly speaking, legal estates.

Fiat.

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GOSLING *v.* BIRNIE.

Jan. 29.

TROVER for timber in the possession of Defendant as a wharfinger, and sold to the Plaintiff by one *Ross*.

The Defendant, a wharfinger, having acknowledged certain timber on his wharf to be the property of the Plaintiff, Held, that he could not dispute the Plaintiff's title in an action of trover, brought against him by the Plaintiff.

The defence was, that the timber belonged to one *Allum*, to whom it was alleged *Ross* had sold it before he sold it to the Plaintiff. As to which, it appeared on the trial, that on the 9th of *October* 1829, *Ross* had contracted to sell the timber in question, then standing, to *Allum* for 113*l.* 9*s.*, to be paid on delivery of the timber, and had marked it with the letter A. — 20*l.* or 30*l.* to be paid when half the timber should be delivered on *Basingstoke* wharf.

On the 23d *October*, *Allum* paid *Ross* 10*l.* on account, and on the 30th, 30*l.* more. The timber was sent to Defendant's wharf at *Basingstoke*, and he was apprised that it had been sold to *Allum*, who marked the whole of it. At this time, 18*l.* 9*s.* was due from *Ross* to the Defendant, for the cartage of the timber, which sum *Allum*, upon an order from *Ross*, paid to the Defendant's agent in *London*, on the 5th *November*. There had been much disputing about the payment of this 18*l.* 9*s.*, and on the 27th of *October*, *Ross* had given *Allum* notice, that unless he fulfilled his engagement by the 29th, he *Ross* should consider himself no longer bound to abide by the terms.

On the evening of the 5th of *November*, *Ross* wrote to *Allum*, stating, that all the timber was now on *Basingstoke* wharf, and that, unless the balance, 50*l.* 14*s.*, due in respect thereof, were paid the next day, *Ross* would sell the timber again, and hold *Allum* responsible for any loss.

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The money not having been paid by that time, *Ross*, on the 7th of *November*, sold the timber to the Plaintiff, and gave a written order to the Defendant to deliver it upon receiving 18*l.* 9*s.* for the cartage. The Defendant, upon receiving the written order and the 18*l.* 9*s.*, said, "Very well; I will hold the timber for you." Some time afterwards he told the sawyers that the timber belonged to the Plaintiff, and not to *Allum*, and ultimately delivered to the Plaintiff a bill for wharfage, saying, "These are the only charges on your timber."

On the 11th of *November*, *Allum*, not knowing of the transfer to the Plaintiff, paid 50*l.* 14*s.* into the *Basingstoke* bank, on *Ross*'s account.

A verdict having been found for the Plaintiff,

Taddy Serjt. obtained a rule *nisi* for a new trial, on the ground that the title to the timber in dispute was clearly shewn to be in *Allum*, under a prior contract, on which there had been, at least, a part payment; and that, however the wharfinger might be responsible upon his acknowledgment or undertaking to the Plaintiff in an action of *assumpsit*, he could not, by such acknowledgment, divest *Allum* of his property, or give the Plaintiff any right to recover in an action of trover, where property alone was the question. In *Ogle* v. *Atkinson* (*a*), *Gibbs* C. J. held, that a warehouseman receiving goods for a consignee, who has had actual possession of them, to be kept for his use, may nevertheless refuse to re-deliver them if they are the property of another.

Wilde Serjt. shewed cause. The Defendant is estopped by his own admissions to say that the timber is not the property of the Plaintiff. The proposition ascribed

(*a*) 5 *Taunt.* 759.

to

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to *Gibbs* C. J., in *Ogle* v. *Atkinson*, was unnecessary to the decision of the case, and could scarcely have been delivered in so unqualified a shape. The decision turned on the point that the goods having been fairly in the possession and power of the Plaintiff before he delivered them to the Defendant, the Defendant could not retain them at the request of the party who consigned them to the Plaintiff. Where a wharfinger has once admitted that goods in his possession belong to a given individual, or has received them as such, he cannot afterwards dispute his employer's title. *Dixon* v. *Hamond* (*a*), *Hawes* v. *Watson* (*b*), *Harman* v. *Anderson* (*c*), *Barton* v. *Boddington* (*d*).

Taddy Serjt. The cases cited are, for the most part, cases of stoppage *in transitu*, and the question has merely been, whether there has been such a delivery of the goods to the Plaintiff as to preclude a stoppage; they are also chiefly cases of contests between vendor and vendee. Thus, in *Harman* v. *Anderson*, the transfer in the wharfinger's books was held a sufficient delivery to prevent stoppage *in transitu*. And in the same case in *banc* the sending the delivery-note was held sufficient. So in *Zwinger* v. *Samuda* (*e*) and *Lucas* v. *Dorrien* (*g*), notice to the docks of the transfer-order, or dock-warrant being indorsed, was held sufficient for the same purpose. And those cases turned upon the ground, that the delivery of the symbol of property is the delivery of the property. In *Hawes* v. *Watson*, the note of the wharfinger, that he had transferred, was considered equivalent; and *Bayley* J. said, "When *Raikes* and Co. signed the order to transfer, weigh, and deliver, that, according to the settled course and usage of trade, enabled *Maberley* and

(*a*) 2 *B.* & *A.* 310.
(*b*) 2 *B.* & *C.* 541.
(*c*) 2 *Campb.* 242.
(*d*) 1 *Carr.* & *P.* 207.
(*e*) 7 *Taunt.* 265.
(*g*) 7 *Taunt.* 278.

Bell

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Bell to sell the goods again." This appears to be the true ground of the case, for the original owner by his order enabled the sub-vendors to transfer a title to their vendees. So in all the dock cases, the first indorsement by the original owner enabled the sub-vendors to convey a title.

But the wharfinger himself can convey no title. He cannot make the title of other parties better or worse. Much less can he by mere acknowledgment create a title against a third party whose goods he holds. In *Barton* v. *Boddington* the first owner had given the usual transfer order, which *Abbott* C. J. said determined the case, because he could not call on the Dock Company to deliver to him. He had created a title in another. The wharfinger may be liable in *assumpsit* upon his admission or acknowledgment, but he cannot confer a title to recover in an action of trover. The case of *Dixon* v. *Hamond* plainly shews the difference between *assumpsit* and trover. *Abbot* C. J. says, "The legal title to the ship has nothing to do with this question." But in trover there is no question but the legal title. If it were otherwise, the fraud or mistake of the wharfinger or agent might alter the right of property. He might, by delivering the goods over after action brought, exclude the true owner, or put him to great disadvantage by compelling him to be plaintiff instead of defendant. Could any acknowledgment by a livery stable-keeper enable his vendee to recover in trover another's horse? In *Ogle* v. *Atkinson* the plaintiff established a clear title, which was the ground of the decision in his favour; and nothing can affect the title of the original owner but his own act. In trover, the question is, who has the right of possession? And the right of possession cannot depend on the wrongful act of the agent.

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TINDAL C. J. It is unnecessary to determine many of the questions which have been argued, or to pursue closely all the decisions which have been referred to. This is an action of trover, in which I agree that the question is, whether the Plaintiff can shew the property to be in himself: as to which, in the present case, the Defendant is estopped by his own admissions; for, unless they amount to an estoppel, the word estoppel may as well be blotted out from the law. The Plaintiff is sent with an order to the Defendant's wharf; the order is received, and the Defendant says it is complied with. He afterwards tells his sawyers that the timber is not the property of *Allum* but of the Plaintiff; and ultimately sends the Plaintiff certain charges, saying, that those were the only charges in respect of his timber. The only question is, Whether, after this, the Defendant can set up the title of a third person, which is the less allowable, because, at the time he made the admissions, he was fully acquainted with the claim of *Allum*. The Plaintiff having relied on these expressions, was entitled to suppose that the Defendant kept the timber for him. It has been urged, that *Hawes* v. *Watson* and similar cases, related to a stoppage in *transitu*; but the principle of estoppel does not vary according to the varying rights in each individul case, and the acts and words of the Defendant here place him out of court as much as if he had made the admission in court. It is unnecessary, therefore, for us to decide in whom the property of the timber vests, although I am far from being satisfied that it is in *Allum*.

PARK J. It is not necessary for us to decide in whom the property is vested, nor whether the Defendant is liable to an action at the suit of *Allum*, although it does not appear to me so clear that *Allum* has any claim. But I rely on the acknowledgment made three times by the

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the Defendant. Upon receiving the order he says to the Plaintiff, "I will hold the timber for you," without making any mention of *Allum*; and it would be a gross fraud on the Plaintiff if, after that, he were held not entitled to recover. Upon another occasion he reprimands the sawyers for cutting the Plaintiff's timber; and, ultimately, when the Plaintiff enquires what the charges were in respect of the timber, the Defendant's answer is, "These are the only charges on *your* timber." This brings me to the case of *Hawes* v. *Watson*; for the case of *Barton* v. *Boddington* has no application to the present. In *Hawes* v. *Watson* the wharfinger wrote, "Messrs. *Hawes*, we have this day transferred to your account, by virtue of an order from *Maberly* and *Bell*, 100 casks of tallow." Which was taken as an acknowledgment; and Lord *Tenterden* says, "The plaintiffs in this case paid their money upon the faith of the transfer note signed by the defendants by which they acknowledged that they held the tallow as their agents. If we were now to hold, that, notwithstanding that acknowledgment and that payment, the plaintiffs are not entitled to recover, we should enable the Defendants to cause an innocent man to lose his money. To hold that the doctrine of stoppage *in transitu* applied to such a case as the present, would have the effect of putting an end to a very large portion of the commerce of the city of *London*." *Holroyd* J. said, "I think that the note given by the Defendants makes an end of the present question. When that note was given, the tallow became the property of the plaintiffs, and is to be considered from that time as kept by the defendants as the agents of the plaintiffs, and the latter were to be liable from the 10th of *October* for all charges." And *Best* J. said, "I am also of opinion that the acknowledgment which has been given in evidence puts an end to all questions in this case." That is decisive as to the principle.

ciple. And *Ogle* v. *Atkinson* does not apply, for the decision chiefly turned on a question of stoppage *in transitu*.

BOSANQUET J. I think the Plaintiff is entitled to recover; and if we were to hold otherwise, we should throw doubts on the principle by which a large portion of the trade of *London* is regulated; namely, that if a wharfinger acknowledges the title of the person for whom he holds, he cannot afterwards dispute it: and it is not material whether the acknowledgment be oral or written. In questions between *vendor* and *vendee*, the bill of lading, the symbol of property, may be material, but as against a wharfinger it is immaterial whether the admission of title be written. The principle is clearly laid down in *Stonard* v. *Dunkin* (*a*), where Lord *Ellenborough* says, "Whatever the rule may be between the buyer and seller, it is clear the defendants cannot say to the Plaintiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing, they attorned to him." And *Hawes* v. *Watson* is decisive of this question. There the Chief Justice said, that the acknowledgment was conclusive evidence against the wharfinger. And *Holroyd* J. concurred with him. The title set up in *Hawes* v. *Watson* was that of *Raikes*. And the *London* Dock Company in a subsequent case were in the same situation as *Watson*. They delivered the goods, and *Raikes* sued them because the goods had been delivered before they were weighed, *Raikes* claiming a right to stop *in transitu* till they had been weighed. The Court held he had no such right; but that decision was independent of the principle established by that case and *Stodart* v. *Dunkin*, that whatever may be the claim of a third person, the Defendant,

(*a*) 2 *Campb.* 344.

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as a wharfinger, cannot set it up after having admitted the Plaintiff's title.

ALDERSON J. I concur with the rest of the Court in the opinion they have given. In this case Defendant has repeatedly acknowledged the title of the Plaintiff to the timber, with a full knowledge of the transaction as to the contract made with *Allum*.

Under those circumstances he cannot afterwards be allowed to dispute that title on grounds *with which he was fully acquainted when he made the admissions*.

Rule discharged.

Jan. 29.

DOE dem. HARDING *v.* COOKE.

Ejectment. The Plaintiff proved twenty years' possession. The Defendant ten years following the twenty: Held, that the Plaintiff was entitled to recover.

EJECTMENT. At the trial before *Vaughan* B. last *Devon* assizes, the lessor of the Plaintiff proved that his father had let the premises, and received the rent from 1797 to 1811, and that the lessor of the Plaintiff had received the rent from 1816 to 1819, — a higher rent than had been paid to his father. It did not appear that the father had any other son.

The Defendant proved that he had been in possession ever since 1819.

A verdict having been found for the Plaintiff,

Wilde Serjt. obtained a rule *nisi* for a new trial, on the ground that the lessor of the Plaintiff had shewn no title as against one who had been ten years in possession.

Jones

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Jones Serjt. shewed cause. Twenty years' possession gives a *primâ facie* right to bring ejectment. *Stokes* v. *Berry* (*a*), *Stocker* v. *Burny* (*b*), *Denn* v. *Barnard.* (*c*) If so, no counter presumption can arise from any possession of shorter duration, and the lessor of the Plaintiff must succeed, unless the Defendant shews a subsequent title by some other means. If ten years' subsequent possession were sufficient, why not five, or one, or less than one?

Wilde. The lessor of the Plaintiff must recover on the strength of his own title, not on the weakness of the Defendant's. (*d*) Actual possession for the last ten years is a good *primâ facie* title as against the preceding twenty; and it is for the Plaintiff to shew why he was out of possession for the last ten. In the cases referred to, the possession of the lessor of the Plaintiff continued down to the time of the ouster. The Defendant is not called upon to disclose the particulars of his title because the lessor of the Plaintiff may formerly have held the same property.

TINDAL C. J. In this case, it was proved that the elder *Harding* and his son held the premises for twenty-three years, and during that time received and increased the rent, an unequivocal act of ownership, from which the law presumes a seisin in fee. The father died seised; and the lessor of the Plaintiff is the only son who is shewn to have survived him. That would be enough, even in a writ of right, to call on the tenant to establish a stronger claim.

It is admitted on the part of the Defendant, that this would have been sufficient, if the ejectment had been

(*a*) 2 *Salk.* 421.
(*b*) *Ld. Raymd.* 741.
(*c*) *Cowp.* 595.
(*d*) 11 *East*, 495.

brought

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DOE dem. HARDING v. COOKE.

brought within a year or two after the lessor of the Plaintiff had been out of possession. But if two years would not have preponderated against the lessor of the Plaintiff, I cannot see why any period short of twenty years should be supposed to raise a counter presumption sufficient to outweigh the presumption arising from the first twenty years. In many cases it would be extremely hard to cast on the lessor of the Plaintiff the burthen of shewing how the Defendant came into possession. The lessor of the Plaintiff may have been an infant, or out of the kingdom at the time. The earlier presumption, therefore, must prevail till a better title is shewn.

PARK J. We alter no rule of law by deciding in favour of the lessor of the Plaintiff. He has shewn a presumptive title, arising out of twenty-three years' possession. The Defendant sets up a later possession of ten years. There is presumption against presumption, which throws the Defendant upon establishing, if he can, a title of a higher description. If the property had been sold, it was easy for the Defendant, who asserted the sale, to prove it; and no injustice can be done, because even now he may prove it in another ejectment.

BOSANQUET J. concurred.

ALDERSON J. The Defendant relies either on his own title or on the *jus tertii*; but he has failed to shew either the one or the other.

Rule discharged.

1831.

LEVY *v.* BAILLIE and Others.

Jan. 31.

Plaintiff effected a policy of insurance against fire, with a condition that the Plaintiff should forfeit all benefit under the policy, if there were any fraud or false swearing in the claim he made.

A fire ensued, and the Plaintiff made affidavit of damage to the extent of 1085*l.* Having sued for the amount, and a jury having found a verdict for him, with only 500*l.* damages,

The Court granted a new trial.

ACTION on a policy of insurance against fire, which contained, among others, the following condition: — "Persons insuring with the society, sustaining any loss or damage by fire, are required to give immediate notice thereof to the principal office of the society, or to the authorized agents of the society in the respective districts; and are also to deliver in as full an account of their loss or damage as the nature of the case will admit of, and to make proof of the same by their affidavit or affirmation, and produce such other evidence as the directors of the society may reasonably require; and until such affidavit or affirmation, account and evidence, be produced, the amount of such loss, or any part thereof, shall not be payable or recoverable:

And if there appear fraud in the claim made, or false swearing or affirming in support thereof, the claimant shall forfeit all benefit under such policy."

The Plaintiff, an upholsterer, carried on business in a small house in the *New Cut*, *St. George's Fields*, and the insurance, to the amount of 1000*l.*, was effected on his stock in trade, the 22d of *November* 1827. The premises were burnt down on the night of the 14th of *February* 1830. The Plaintiff made affidavit that, in consequence of the fire, he had sustained a loss of stock to the amount of 1085*l.*: viz. 85*l.* for goods which were injured in the process of removal, and 1000*l.* for goods which had been abstracted by the crowd assembled on the occasion, and had never been recovered. The goods so lost were alleged to consist of four-post beds, mahogany tables of various sizes, couches, chairs, stools, chimney-glasses, pier-glasses, carpets, and the like.

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The Defendants contended that this claim was fraudulent, and called witnesses to shew that it was impossible for goods so numerous and bulky to have been carried off undiscovered. These witnesses stated, that policemen were on the spot as soon as the fire broke out; that a cordon was established round the premises almost immediately; that the fire was over in about two hours; and that no article of size could have been carried away. The Plaintiff's witnesses denied that the blockade had been so effectual, and the Chief Justice left it to the jury to say, whether the Plaintiff had made a fraudulent demand or not.

The jury having found a verdict for the Plaintiff with 500*l.* damages,

Taddy Serjt. obtained a rule *nisi* for a new trial, on the ground that the finding of 500*l.* damages, instead of the whole amount sworn to by the Plaintiff, amounted in effect to a verdict for the Defendants, under the condition which avoided the policy if there were any fraud or false swearing in the Plaintiff's claim. A claim of 1085*l.*, where a party had lost only 500*l.*, could not be other than fraudulent.

He also objected to the verdict as contrary to evidence.

Wilde and *Andrews* Serjts., who shewed cause, contended, that the finding of the jury was not necessarily a proof that there had been any fraud in the Plaintiff's claim. He might by mistake have estimated the goods lost at more than their value. As to the probability of loss, the evidence was merely conflicting.

Taddy, *Russell*, and *Bompas* Serjts. were heard in support of the rule; which

The Court, having taken time to consult, made

Absolute on payment of costs.

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PERMEWAN *v.* WILLIAM MITCHELL, and ELIZABETH, his Wife, and JOHN BILLING. *Jan.* 31.

Devise of land to trustees, in trust to put *E. E.* in possession of them when she comes of age, and if she die during her minority, or without *issue*, in trust for *T. E.* But if *E. E.* attain twenty-one or marry, one third for the use of the first male issue of her body; one third for the use of the second male issue; and one third for the use of the third male issue; charged with an annuity for *E. E.* But if *E. E.* die without male issue, and leave female issue, for the use of the female issue and the heirs male of their bodies:

Held, that *E. E.* took an estate tail.

THIS was a case directed by the *Vice Chancellor* to be submitted for the opinion of the Court of Common Pleas on the following facts.

Henry Ellis, the late father of the Defendant *Elizabeth Mitchell*, late *Elizabeth Ellis*, spinster, being seised to him and his heirs of, amongst other hereditaments, certain lands called *Trevorian*, situated in the parish of *Sennen*, in the county of *Cornwall*, duly made and published his last will and testament in writing, dated the 9th of *March* 1804, and which was executed and attested as required by law for devises of real estates of inheritance: and he thereby, after giving to *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, therein severally named, all his household furniture and stock, upon certain trusts therein mentioned, proceeded as follows: — "And all the rest, residue, and remainder of my goods, chattels, bonds, bills, writings, or securities for monies which I may have in my possession at the time of my death I also give unto the before named *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, in trust to and for the use, benefit, and advantage of my only daughter *Elizabeth Ellis* until she shall attain the age of twenty-one years, at which time a true and just account of all monies paid and received by them shall be tendered her, and she shall be put into possession of all my said goods, chattels, bonds, bills, writings, or securities for monies. I give, devise, and bequeath to the said *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, in trust to and for the use of my said daughter when she shall attain the age

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of twenty-one years, all my freehold messuages, lands, tenements, hereditaments, and premises situate, lying, and being in the several parishes of *St. Just*, *Sennen*, and *Paul* in the aforesaid county of *Cornwall*, and the income arising from the same from time to time, to be by them laid out and invested in proper and good securities, there to accumulate and increase to and for the use of my said infant daughter *Elizabeth Ellis* during her minority, and to be paid and payable unto her when she attains the said age of twenty-one years; and at which time she is to be put into full and free possession of all my said messuages, lands, and tenements: allowing unto my said daughter for her education and maintenance during her minority the yearly sum of 25*l.*: but, in case my said daughter shall die during her minority, or die without issue, then, and in that case, I give, devise, and bequeath unto the said *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, in trust to and for the use of *Thomas Ellis* the younger, son of the said *Thomas Ellis*, one of the trustees named in this my said will, all my freehold lands, messuages, tenements, and hereditaments as aforesaid, and all my goods, bonds, writings, and chattels whatsoever which they may have in their custody, on his attaining the age of twenty-one years; to the use of him the said *Thomas Ellis* the younger, and his assigns during his life, and from and immediately after his decease, to the use of his first son lawfully begotten, and the heirs male of the body of such son lawfully issuing; and in default of such issue, to the use of his second, third, fourth, fifth, sixth, and seventh sons, and the heirs male of their bodies issuing, the eldest of such sons to be preferred before the youngest, and the heirs male of their bodies issuing: and in failure of such male issues as aforesaid, to my right heirs for ever. But in case my said daughter attains the said age of twenty-one years, and happens to marry,

marry, then I give, devise, and bequeath unto the said *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, for the use of the first male issue, to be begotten lawfully on her body, my estate of land called *Trevedra*, situate in the parish of *St. Just*; and to the second male issue to be begotten as aforesaid, my estate of land called *Trevorian*, in the parish of *Sennen*: and to the third male issue, my freehold premises which I have in the village of *Moushole*, in the parish of *Paul*, on their severally attaining the age of twenty-one years, and the heirs male of their several bodies lawfully issuing; permitting my said daughter to receive the incomes arising therefrom to her own use during their several minorities, and the male issue paying unto my said daughter during her life an annuity or yearly sum of 15*l*., clear of all outgoings, out of my said estate of *Trevedra*, with power of distress for nonpayment. But should my said daughter *Elizabeth Ellis* die without male issue, and leave female issue or issues, then I give, devise, and bequeath unto the said *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, and the survivors of them, all my said freehold messuages, lands, tenements, hereditaments, goods, and chattels whatsoever, for the use of the said female issues, share and share alike, both in respect to freehold and chattel effects, and the heirs male of their several bodies issuing; but in failure of male issue or issues, to my own right heirs for ever."

The testator died seised of the several messuages and hereditaments so devised as aforesaid, shortly after the date of his will, without having revoked or altered the same, leaving his daughter *Elizabeth Ellis*, then an infant, his only child and heiress at law.

Elizabeth Ellis attained her age of twenty-one years some time previously to the year 1814.

By indentures of lease and release, dated respectively the 11th and 12th days of *January* 1814, the release

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being of three parts, made between *Elizabeth Ellis* of the first part, *John Philpot* of the second part, and *Edward Coode*, the younger, of the third part, it was witnessed, that for the purpose of barring all entails in the said premises, and for the nominal consideration therein mentioned, *Elizabeth Ellis* released unto *John Philpot* and his heirs, all the said messuages and premises devised by the will of the testator, to hold the same unto and to the use of *John Philpot* and his heirs, to the intent that a recovery should be duly suffered of the said premises, in which *Edward Coode* should be demandant, and *John Philpot* tenant, who should vouch *Elizabeth Ellis*, who should vouch over the common vouchees; which said recovery, it was thereby agreed, should enure to the use of *Elizabeth Ellis* and her heirs.

Pursuant to the said indentures of lease and release, and in manner therein agreed upon, a common recovery of the said premises was duly suffered in *Hilary* term 1814. *Elizabeth Ellis* intermarried with the Defendant *William Mitchell* in *January* 1815.

The question for the opinion of the Court was, whether the Defendant *Elizabeth Mitchell* was, at the time of the marriage, entitled to an absolute estate of inheritance in fee simple in the said lands called *Trevorian*.

Russell Serjt. for the Plaintiff. If *Elizabeth Mitchell* took an estate tail under the will, it must be by force of the words, "but in case my said daughter shall die without issue, then," &c. And there are many cases in which the word *issue* in a will has been deemed equivalent to *heirs*. But in *Doe d. Cooper* v. *Collis* (*a*), Lord *Kenyon* says, "Considering the cases altogether, I think

(*a*) 4 *T. R.* 299.

this

this position is to be collected from them, that, in a *will*, *issue* is either a word of purchase or of limitation, as will best answer the *intention* of the devisor; though in the case of a deed it is universally taken as a word of purchase." And that was a strong case; for the testator devised all his real estate unto his wife for her life, and after her decease to his daughters *Eleanor* and *Susannah*, to be equally divided between them, not as joint tenants, but as tenants in common; the one moiety to his daughter *Eleanor* and her heirs for ever, and the other moiety to his daughter *Susannah for life*, and after her decease to the *issue* of her body lawfully begotten, and their heirs for ever. The Court held that *issue* there was a word of purchase, because otherwise the estate would not have been equally divided; for if an estate tail had been given to *Susannah*, the ultimate reversion of her moiety would have been again subdivided between her and *Eleanor*; and *Eleanor* and her heirs would have taken a moiety of this reversion over and above the first moiety of the whole given to them. *Susannah*, therefore, took only for life, and her children took a fee. And Lord *Kenyon* says, "In some cases, as in *Doe* v. *Laming* (*a*), the words *heirs of the body* have been restrained in this way, and they always give way with greater difficulty than the word *issue*."

In the present case, therefore, the enquiry is, in what sense *issue* is used by the testator. It is used in the same sense as *children*; and *male issue*, in the latter part of the will, is used as a *description of the person*. In *Goodright* v. *Dunham* (*b*) the devise was to *Jeffery Laming* for life, and after his death to all his children equally, and their heirs; and in case he died without *issue*, then over. And it was admitted that *issue* meant the same as *children*, and would

(*a*) 2 *Burr.* 1100. (*b*) *Doug.* 264.

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not convert the estate for life of *Jeffery* into an estate *tail*. So in *Luddington* v. *Kime* (*a*) the devise was to *E. Armyn* for life, without impeachment of waste; and in case he should have any issue male, then to such issue male and his heirs for ever; and if he should die without issue male, then over. It was held that *E. Armyn* took only an estate for life; that his issue, if he had any, would have taken a fee by purchase; and that the devisor used *issue* as a description of the person, because he added a further limitation to the issue, viz. to the heirs of such issue for ever. So here, a further limitation is added to the term *male issue*, viz. "to the female issues and the heirs male of their bodies." Although, therefore, if the will had stopped at the first part, the words "die without issue" might have been considered as a dying without issue generally, yet it is clear by the subsequent part of the will, that a dying without *leaving* issue, and without leaving the particular issue there mentioned, viz. first, male children, and then female, was contemplated. It is the same, therefore, as if the will had the word *children*, instead of issue. And a construction giving the devisee an estate tail would destroy the manifest intention of the testator to divide the estates amongst her three sons.

But supposing she took only an estate for life, it may be contended on the other side that her recovery destroyed the contingent limitations to the children. Those limitations, however, are conditional limitations, in the nature of an executory devise, which could not be destroyed. The daughter's particular estate would not support the estates to the children, because it ceased upon her arriving at twenty-one years, or marrying; whereas the estates of the children could not vest in them, or in their trustees for them, till they were born. (*b*)

(*a*) 1 *Ld. Raym.* 203. (*b*) *Fearne*, 397.

The

The estate of the children, after the mother's arriving at twenty-one, would be a freehold to commence in futuro, viz. on their respective births. The limitation, therefore, must be holden an executory devise, and if so, it could not be affected by the recovery. (*a*) But if the Court holds that the estate of the trustees commenced before any children born, it commenced when the mother arrived at the age of twenty-one. And therefore there was an existing estate in the trustees at the time of the recovery, to support the estates of the children, even if they should be considered as contingent remainders.

Wilde Serjt. *contrà.* The Defendant, at the time of her marriage, was entitled to an estate of inheritance. Where the subordinate intention of a testator is at variance with his paramount or prevailing intention, the paramount intention must be pursued; and upon this will, it is clear the testator did not intend that the estate should go over as long as there was any issue of his daughter; such an event, however, might come to pass, if the construction contended for by the Plaintiff were adopted. The Defendant, therefore, must be held to have taken an estate tail under the devise.

Russell. The paramount intention was, that the property should go to three children of the daughter if she should have so many; and that intention is defeated if she took an estate tail.

Cur. adv. vult.

The following certificate was afterwards sent: —

This case has been argued before us by counsel. We have considered it, and are of opinion that the Defendant, *Elizabeth Mitchell*, was, at the time of her

(*a*) *Fearne*, 416.

marriage,

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marriage, entitled to an absolute estate of inheritance in fee simple, in the said lands called *Trevorian*.

N. C. TINDAL.
J. A. PARK.
J. B. BOSANQUET.
E. H. ALDERSON.

Jan. 31.

DAVIS *v.* NICHOLSON.

Where a Defendant obtains depositions from India under 13 *G.* 3. *c.* 63, the Plaintiff is entitled to copies, at his own expense.

THE Defendant, by virtue of a *mandamus* under 13 *G.* 3. *c.* 63. *s.* 44., had procured depositions from *India* touching certain matters in dispute in this cause. The Plaintiff had called on the secondary for copies of these depositions, which copies he offered to pay for; whereupon,

Taddy Serjt. obtained a rule *nisi* to restrain the secondary from giving copies, alleging, that it was unjust the Plaintiff should thus, the *mandamus* having issued at the Defendant's expense, be made acquainted before trial with the facts on which the defence rested.

Wilde Serjt. shewed cause on an affidavit which stated that it was the practice of all the Courts to grant such copies. He urged, also, that though a party does not concur in the application for a *mandamus*, he may appear by counsel in *India* and cross-examine the deponents; and when the depositions arrive in *England*, notice is sent to the attornies on both sides to attend the breaking of the seal. It has never been decided that the opposite party is not entitled to a copy unless he concurs in the expense of the *mandamus*. In criminal cases a party is entitled to a copy under *s.* 40. of the act; and *Grillard* v. *Hogue* (*a*) has

(*a*) 1 *Brod.* & *Bingh.* 519.

decided,

decided, that the remedy in civil cases is as extensive as in criminal.

Taddy. No inference can be drawn from the absence of decisions but that the point has not before been contested. As to the practice, it is a bad one, and, *malus usus abolendus.*

TINDAL C. J. The fortieth section of the act relates to the manner of proceeding on indictments; the forty-fourth to civil suits. The fortieth section enacts, that "in all cases of indictments, or informations, laid or exhibited in the Court of King's Bench for misdemeanors, or offences committed in *India*, it shall and may be lawful for his majesty's said Court, upon motion to be made on behalf of the prosecutor, or of the defendant or defendants, to award a writ or writs of *mandamus*, requiring the Chief Justice and Judges of the supreme court of judicature for the time being, or the Judges of the mayor's court at *Madras*, *Bombay*, and *Bencoolen*, as the case may require, who are hereby respectively authorized and required to hold a court with all convenient speed for the examination of witnesses, and receiving other proofs concerning the matters charged in such indictments or informations respectively; and such examination shall be then and there openly and publicly taken *viva voce* in the said court, upon the respective oaths of witnesses, and the oaths of skilful interpreters, administered according to the forms of their several religions; and shall, by some sworn officer of such court, be reduced into one or more writing or writings on parchment, in case any duplicate or duplicates should be required by or on behalf of any of the parties interested, and shall be sent to his majesty, in his Court of King's Bench, closed up, and under the seals of two or more of the Judges of the said court, and one

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one or more of the said Judges shall deliver the same to the agent or agents of the party or parties requiring the same," &c.; and then directs that these depositions "shall be allowed and read, and shall be deemed as good and competent evidence as if such witness had been present, and sworn and examined *viva voce* at any trial for such crimes and misdemeanors as aforesaid, in his majesty's said Court of King's Bench, any law or usage to the contrary notwithstanding; and all parties concerned shall be entitled to take copies of such depositions at their own costs and charges."

The forty-fourth section directs, "that when and so often as the said united company, or any person or persons whatsoever, shall commence and prosecute any action or suit, at law or in equity, for which cause hath arisen, or shall hereafter arise in *India*, against any other person or persons whatever in any of his majesty's courts at *Westminster*, it shall and may be lawful for such courts respectively, upon motion there to be made, to provide and award such writ or writs in the nature of a mandamus or commission as aforesaid to the Chief Justice and Judges of the said supreme court of judicature for the time being, or the judges of the mayor's court at *Madras*, *Bombay*, or *Bencoolen*, as the case may require, for the examination of witnesses as aforesaid; and such examination being duly returned, shall be allowed and read, and shall be deemed good and competent evidence at any trial or hearing between the parties in such cause or action, in the same manner in all respects as if the several directions hereinbefore prescribed and enacted in that behalf were again repeated."

The only question then, is, Whether the enactment of the fortieth section as to the taking copies of the depositions is, by reference, incorporated in the forty-fourth: and I am of opinion it is. In the first place, the forty-fourth section says nothing about cross-examination by counsel

counsel in *India*. But that privilege must be taken to extend to parties in civil suits, under the words "in the same manner in all respects as if the several directions hereinbefore prescribed and enacted in that behalf were again repeated." Why, then, should not the right of a party to take copies at his own charge be also incorporated? It has already been decided, that with respect to the power of issuing the mandamus, the forty-fourth section is to receive the same construction as the fortieth. Looking, therefore, at the language and object of the act, and the constant practice which has prevailed, I think this rule should be discharged.

PARK J. The two sections must be taken together, for the forty-fourth section refers to the directions in the fortieth as if they were repeated in the forty-fourth. And that section has in this Court been held to apply to Defendants as well as Plaintiffs, although Plaintiffs only are specified. The fortieth section says, "All parties concerned shall be entitled to take copies of such depositions at their own costs and charges," and it would be absurd to construe that passage, as it has been proposed, "all parties applying for the *mandamus*;" for they who apply for the mandamus do not want the copies. It has been the constant practice to grant them in the King's Bench; the practice has never been contested, and that goes far to shew that the proper construction has been put on the statute.

BOSANQUET J. I am of the same opinion. When the rule *nisi* was obtained, the attention of the Court was not called to the fortieth section of the act. The practice has been conformable to it, and this rule must be discharged.

ALDERSON J. I am of the same opinion. The statute prescribes, section 40., that in *India* the agents or counsel

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counsel of parties concerned are to be summoned, and that copies of the depositions shall be given here to any who apply. That has been the constant practice in civil as well as criminal cases.

Rule discharged.

Jan. 31.

MANNING *against* CLEMENT.

Libel. The Plaintiff alleged that he carried on in an honest and lawful manner the trade of a manufacturer of bitters, and that the Defendant libelled him in his trade by publishing that the bitters were made to adulterate porter: *per quod* the Plaintiff was ruined:

Held, that under the general issue the Defendant might give in evidence that the Plaintiff's trade was illegal, and that his bitters had been condemned in the Court of Exchequer.

LIBEL.

The declaration alleged, that before and at the time of committing the several grievances by the Defendant thereinafter mentioned, the Plaintiff had exercised and carried on, and did exercise and carry on, *in an honest and lawful manner*, the trade and business of a manufacturer of various bitters, with which, in the way of his said trade, he supplied various licensed publicans; and certain of which said bitters were called and known by the name of the *imperial purl bitters*, to wit, at &c. Yet the Defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the Plaintiff in his good name, fame, and credit, and to bring him into public scandal and disgrace with and amongst all his neighbours, and other good and worthy subjects, theretofore, to wit, on &c., at &c., falsely, wickedly, and maliciously did publish, and cause and procure to be published, of and concerning the said Plaintiff *in the way of his said trade*, a certain false, scandalous, malicious, and defamatory libel, in which said libel was contained the false, scandalous, malicious, and defamatory matter following, of and concerning the said Plaintiff in the way of his said trade, that is to say, —(the innuendoes are omitted)— "Adulteration of porter. To the editor of *Bell's Life in London*. Sir, — It appears that the crown lawyers have consented to a com-

compromise of the prosecution against Mr. *Manning* for manufacturing what he called *purl bitters*, but which, instead of being bitters, was stuff for adulterating porter. It has been hinted that this compromise has been made with the intention of allowing Mr. *Manning*, as an informer against a hundred or two publicans, who have been using this stuff. I hope it is not true that such is to happen, but I think that, instead of the quiet manner in which this prosecution has been allowed to end, the thing ought to be exposed as much as possible. The excise have no wish for exposure, because they have suffered the manufacture of the article for years, and are probably ashamed of their neglect; but let us have an exposure of the men who have been guilty of such nefarious practices. They deserve exposure, they deserve the greatest punishment. The public ought to know who the publicans are that have been enriching themselves at the expense of their customers' health. Can we be surprised at the stylish manner in which some publicans live, when we find, that by using a gallon of this mixture, called "*Manning*'s bitters," an unprincipled man might take upwards of twenty gallons of porter from a butt, and substitute water? And in justice to the fair and honest publican and to the brewer, an exposure ought to be made of the fraudulent dealer; and I think the public must feel interested on the subject, when they learn that, upon the examination at the Royal Institution, *Manning*'s bitters was found to be composed partly of green vitriol and alum! What hell-broth are we to have next instead of Sir *John Barleycorn*? Yours," &c.

The Plaintiff then alleged general injury to his good name, fame, and credit; and, as special damages, that many publicans whom he named, had, in consequence of the libel, ceased to deal with him in the way of his trade and business.

Plea,

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Plea, the general issue.

At the trial, the Plaintiff, after proving the publication of the libel, called witnesses to prove the excellence of his bitters and the extent of his trade; and then established that many publicans had ceased to deal with him in consequence of this libel.

The Defendant's counsel then called witnesses to shew that these bitters were made of ingredients highly noxious to health; that the Plaintiff's trade was illegal; and that a large quantity of his commodity had actually been seized and condemned in the Court of Exchequer, the Plaintiff being at the same time visited with heavy penalties. This evidence was objected to, but received by *Park* J. after consulting the other Judges, as proof of the illegality of the Plaintiff's trade, but not as proof of the truth of the libel. A verdict having been given for the Defendant,

The Plaintiff in person obtained a rule *nisi* for a new trial, on the ground that evidence as to the nature of his trade ought not to have been received under the general issue, and that the Defendant ought to have pleaded that the trade was illegal if he meant to rely on that point as his defence; otherwise the Plaintiff was misled by the plea of the general issue, under which he proposed only to establish the publication by the Defendant.

Wilde Serjt. shewed cause. The Plaintiff complains of being injured in his trade, and has alleged, that he carried on in an honest and lawful manner the trade of a manufacturer of bitters; that is, of bitters which might legally be sold, and not articles the sale of which was a nuisance. He was bound, therefore, to prove that he carried on a legal trade, although there was no plea alleging that he carried on an illegal trade. If so, the Defendant was entitled to answer the witnesses who alleged that, by calling others to prove the contrary;

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trary; and the Plaintiff could not be deemed to be taken by surprise by a conflict on a point he was bound to come prepared to prove. The Defendant's witnesses were called, not to justify the libel, or to prove its allegations true, but to prove the Plaintiff's trade illegal, and if his trade be illegal, he has no *locus standi* in court, for he cannot be allowed to complain of injury to a business which he ought not to carry on. The Defendant is not to be deprived of this evidence, because, in addition to proof of the illegality of the trade, it may also prove that the libel is true. In *Spall* v. *Massey* (*a*), the Plaintiff having called witnesses to prove an injury to his trade, the defendant was allowed under the general issue to shew the trade illegal; and *Hunt* v. *Bell* (*b*) expressly decides, that in such a case no action lies. There it was holden, that a party who pursued an illegal vocation had no remedy by action for a libel regarding his conduct in such vocation. And facts, which explain the circumstances under which the libel was published, may always be given in evidence under the general issue. Thus, in *Delany* v. *Jones* (*c*), it was holden, that an advertisement in a newspaper containing an imputation injurious to the character of the Plaintiff, might be shewn to have been published *bonâ fide*, and with a view of obtaining information on the subject alluded to in the advertisement, by a person really interested in the enquiry. [*Tindal* C. J. If an action of libel be brought by a surgeon, who alleges that he was legally practising as a surgeon, it is competent to the defendant, under the general issue, to prove that he was not such.] The question is in fact a question of variance. The Plaintiff alleges, and endeavours to prove, that he carries on a legal business, but the business proved, turns out to be illegal.

(*a*) 2 *Stark.* 559. (*b*) 1 *Bingh.* 1. (*c*) 4 *Esp.* 191.

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Storks Serjt. *contrà*. The rule, as laid down in *Smith* v. *Richardson* (*a*), and confirmed by *Wood* B. in *Jones* v. *Stevens* (*b*), is, that under the general issue the Defendant can only shew he did not publish the charge complained of. To shew that the Plaintiff's trade is illegal, is to attack his character as a tradesman, when the point in issue is not his character, but the publication of the libel. Such evidence, therefore, is necessarily a surprise on him. And it is a mode of proving the truth of the libel without pleading its truth in justification. The Plaintiff's business, as alleged on this record, is *primâ facie* a legal business, and he could not be said to carry on an illegal business because it might be shewn that frauds were occasionally practised in the course of the legal business. He ought, therefore, to be apprized by the pleading, what is the sort of charge the Defendant means to bring forward; whether a charge of particular frauds, or of general illegality. In *Hunt* v. *Bell*, it appeared on the face of the record that the business carried on by the Plaintiff was illegal. The Defendant might fairly take advantage of that under the general issue.

Cur. adv. vult.

TINDAL C. J. The declaration in this case stated, that, "at the time of publishing, &c. the Plaintiff had exercised and carried on, and did exercise and carry on, in an honest and lawful manner, the trade and business of a manufacturer of various bitters, with which, in the way of his said trade, he supplied various licensed publicans;" and then proceeded to state that the Defendant published, "of and concerning the said Plaintiff, in the way of his said trade," the libel in question. The Defendant pleaded the general issue. At the trial the

(*a*) *Willes*, 20. (*b*) 11 *Price*, 235.

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Plaintiff gave general evidence that he was a manufacturer of bitters, and proved the publication of the libel, and the innuendo that it related to him in the way of his trade; and after he had closed his case, the Defendant offered evidence with a view to prove that what the Plaintiff sold was not bitters, but a composition of a very different description.

This evidence was objected to on the part of the Plaintiff, on the ground that it amounted, in effect, to proof of the truth of the charge imputed by the libel, in a case where there was no plea of justification. The learned Judge, however, who tried the cause, admitted the evidence, stating to the jury that it was a material allegation in the declaration that the Plaintiff was the manufacturer of various bitters, and that they must apply this evidence to that allegation, and say whether the Plaintiff was truly a manufacturer of bitters, or whether, under that pretence, he manufactured an article of an entirely different description; and he also cautioned the jury, that they were not to consider the evidence in question as applicable in any way to a justification of the truth of the libel, or in mitigation of damages, but simply to the truth of the allegation of the Plaintiff's trade or business.

The question now raised before us is, whether this evidence was properly admitted: and we are of opinion, that, with reference to the allegation of the trade or business of the Plaintiff, the evidence was properly received.

No rule can be more firmly established than that the Defendant cannot give in evidence the truth of the imputation contained in the libel, without pleading such truth as a justification. Since the case of *Underwood* v. *Parks* (*a*) there has never existed a doubt on this point.

(*a*) 2 *Str.* 1200.

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But it is equally certain that where a libel written contains a charge upon a man in the way of his trade or business, the allegation of such trade or business must be strictly proved as it is set forth in the declaration, and that the defendant is at liberty to bring evidence to disprove the fact. And it appears to us that such proof is equally admissible, notwithstanding it may so happen in the particular case, that the disproving the allegation of the trade does, in effect and substance, prove the truth of the imputation in the libel. The necessity of hearing evidence on both sides as to the description of the trade in the declaration being admitted, the legality of such investigation in any particular case cannot depend on the form of the libel.

If the present libel had contained a charge that the Plaintiff, as such trader in bitters, was in insolvent circumstances, or had defrauded his creditors, no one could have doubted that evidence to shew he was not a manufacturer of bitters, but of a very different material, might have been brought forward by the Defendant. How then can it be less admissible, because the libel imputes a charge the truth of which happens to be made out by the evidence in question? There is not the mischief in allowing this evidence which occurs in other cases, for the Plaintiff comes prepared to set up the proof of his trade as stated in the declaration, and to meet any contrary evidence on that point.

Upon the whole, without giving any opinion as to the weight of the evidence when produced, we agree in thinking it was admissible for the point, and with the restriction with which it was admitted, and therefore think the present rule must be discharged.

Rule discharged.

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STANLEY, Administratrix of THOMAS STANLEY, *v.* JONES. *Jan.* 31.

An agreement to communicate such information as shall enable a party to recover a sum of money by action, and to exert influence for procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, is illegal.

DEBT. The declaration stated,

That, by certain articles of agreement made between the Defendant *John Jones*, administrator of the goods and chattels, rights and credits of *Thomas Jones*, late of *Bankside*, in the county of *Surrey*, gentleman, deceased, of the one part, and *Thomas Stanley* of the other part, [after reciting that *Thomas Jones* in his lifetime carried on, in partnership with *Robert Monro* of *Nelson Square* in the county of *Surrey*, and *William Seale Evans* of *Twyning*, in the county of *Gloucester*, gentleman, the establishment of a gas-light concern at *Bankside*, in the county of *Surrey*; that after the decease of the said *Thomas Jones*, the Defendant *John Jones*, as his administrator, succeeded in the place of *Thomas Jones* in the partnership concern; that some time after, *John Jones*, through the representations of *Robert Monro* and *William Seale Evans* that the concern was not so productive and profitable as it really and truly was, was induced to relinquish his interest in the copartnership establishment for a sum very far from equivalent to the value of such interest; and after reciting that *Thomas Stanley* had given the Defendant reason to believe that the representations so made to him by *Robert Monro* and *William Seale Evans*, by which he was induced to relinquish his interest in the aforesaid copartnership concern, were false; and that *Thomas Stanley* being in possession of evidence to manifest the same, and to prove that the Defendant was entitled to recover considerable sums of money from the said *Robert Monro* and *William Seale Evans* on account of the co-partnership concern, had

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agreed to communicate such evidence to the Defendant upon receiving from him the sum of 23*l.* expended by him *Thomas Stanley* in obtaining the same, and upon having an agreement by the Defendant to pay unto him *Thomas Stanley*, his executors or administrators, one-eighth part of the clear amount of such sum or sums of money as the Defendant should or might thereafter recover from the said *Robert Monro* and *William Scale Evans*, or either of them, through the means of him *Thomas Stanley*, after payment of the expenses of recovering such monies; that the Defendant had assented to such proposal, and had agreed to pay to *Thomas Stanley* the said sum of 23*l.*, and to enter into such covenant with *Thomas Stanley* as in the articles of agreement was contained and thereinafter mentioned;] it was witnessed, that for carrying the said recited agreement into effect, and in consideration of the sum of 23*l.* by the Defendant to *Thomas Stanley* paid as therein mentioned, and in consideration, also, of the covenant therein contained on the part of the Defendant, *Thomas Stanley* did thereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the Defendant, that he *Thomas Stanley* should and would, immediately after the execution of the said articles of agreement, communicate unto the Defendant all such knowledge and information as he *Thomas Stanley* possessed touching the falsehoods and misrepresentations made by the said *Robert Monro* and *William Seale Evans*, by which the Defendant was so induced to quit the partnership concern, as in the articles of agreement was mentioned; and should and would give and communicate unto the Defendant all such information as he *Thomas Stanley* possessed, or could or might procure or get at, with a view to the recovery by the Defendant of all such sum or sums of money as the Defendant, as such administrator of the said *Thomas Jones*,

Jones, had been deprived of, or had lost through the misrepresentations of the said *Robert Monro* and *William Seale Evans*; and should and would use and exert his utmost influence and means for procuring such evidence as should or might be requisite to substantiate the claims of the Defendant against the said *Robert Monro* and *William Seale Evans*:

And it was further witnessed, that in consideration of the covenant therein-before contained on the part of *Thomas Stanley*, the Defendant did thereby covenant, promise, and agree with, and to the said *Thomas Stanley*, his executors and administrators, that the Defendant should and would well and truly pay or cause to be paid unto *Thomas Stanley*, his executors and administrators, one clear and equal eighth part or share of all such sum or sums of money as should at any time or times thereafter be recovered or obtained, after payment of the costs and expenses to be incurred in the recovery thereof, either by suit at law or in equity, or by voluntary payment of and from the said *Robert Monro* and *William Seale Evans*, or either of them, or their or either of their executors or administrators, by reason of such information to be communicated and given by *Thomas Stanley* to the Defendant by virtue of the covenant in the said articles of agreement, within one week next after such money or monies should be received by the Defendant:

And the Plaintiff in fact said, that *Thomas Stanley*, immediately after the execution of the articles of agreement, to wit, on, &c. at, &c. did communicate unto the Defendant all such knowledge and information as he, *Thomas Stanley*, possessed, touching the falsehoods and misrepresentations made by the said *Robert Monro* and *William Seale Evans*, by which the Defendant was so induced to quit the partnership concern as in the articles of agreement was mentioned; and did also then, and

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at all other times, after the making of the said articles of agreement, until the receiving of the money by the Defendant of and from the said *Robert Monro* and *William Seale Evans* as thereinafter mentioned, communicate unto the Defendant all such information as he *Thomas Stanley* possessed, or could and might procure, or get at, with a view to the recovery by the Defendant of all such sum and sums of money as the Defendant, as such administrator of the said *Thomas Jones*, had been deprived of, or had lost through the misrepresentations of the said *Robert Monro* and *William Seale Evans*; and did during all that time use and execute his utmost influence and means for procuring such evidence as was requisite to substantiate the claims of the Defendant against the said *Robert Monro* and *William Seale Evans*, to wit, at, &c.: of all which several premises the Defendant there had due notice.

And the Plaintiff in fact further said, that the Defendant did, after the making of the said articles of agreement, and by reason of such information so communicated and given by *Thomas Stanley* to the Defendant as aforesaid, and after the death of the said *Thomas Stanley*, to wit, on, &c. at, &c., and as and by way of a compromise of a certain suit in equity, before then instituted by the Defendant against the said *Robert Monro* and *William Seale Evans*, recover, obtain, and receive by voluntary payment of and from the said *Robert Monro* and *William Seale Evans* a large sum of money, to wit, the sum of 14,000*l.* of lawful money of *Great Britain*, after payment of the costs and expenses which had been incurred in and about the recovery thereof, to wit, at, &c.: whereby and according to the tenor and effect of the said covenant so made by the Defendant as aforesaid, the Defendant, then and there became liable to pay, and ought to have paid, to the Plaintiff, as administratrix

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as aforesaid, within one week next after he had so received the same as aforesaid, one clear and equal eighth part or share thereof, amounting in the whole to a large sum, to wit, the sum of 1750*l.* of like lawful money, to wit, at, &c. Nevertheless the Defendant, not regarding the said articles of agreement, did not, nor would, within one week next after he had so received the said sum of 14,000*l.* as aforesaid, or at any time afterwards, although often requested, &c., pay to the Plaintiff, as administratrix as aforesaid, the said sum of 1750*l.*, being one clear and equal eighth part or share of the said sum of 14,000*l.* so received as aforesaid, after payment of the costs and expenses as aforesaid, but wholly refused and neglected so to do, whereby *actio accrevit*, &c. *Profert*, &c.

Demurrer thereon, and joinder.

Russell Serjt. in support of the demurrer. The agreement is illegal, and amounts to the offence of champerty, the law against which, though ancient, is not obsolete. In *Bell* v. *Smith* (*a*), it is treated by *Bayley* J. as still a portion of the law of the land. And though champerty originally applied only to real actions (*campum partiri*), it was soon held to be equally an offence to stipulate for part of debt or damages, and that it might be committed by all persons, and not merely by officers of the crown. (*b*) *Thomas Stanley* had no interest in the suit which he sought to sustain; the case, therefore, does not come within any of the exceptions to the rule concerning champerty.

Wilde Serjt. *contrà*. This is not a case of champerty; an offence which arose out of a state of society wholly

(*a*) 5 *B.* & *C.* 188.

(*b*) 1 *Hawk. P. C. c.* 84. *s.* 3. *Bac. Abr. Champerty. Statute of Westmr.* 1 *Westmr.* 2. *c.* 49. 28 *Ed.* 1. *c.* 11.

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different from the present. The object of the laws against that offence, was, to prevent persons who might influence the administration of justice from acquiring an interest in the subject of suits. From the same cause arose the rule against the assignment of *choses in action* in general. But in *Master* v. *Miller* (*a*), *Buller* J. says, "It is laid down in our old books, that for avoiding maintenance a *chose in action* cannot be assigned or granted over to another. (*b*) The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case. In 2 *Roll. Abr.* 45. and 46. it is admitted, that an obligation or other deed may be granted, so that the writing passes; but it is said that the grantee cannot sue for it in *his own name.* If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name, or in the name of the grantor, does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in *Westminster Hall.* At one time not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance. (*c*) Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna* or suppress the truth. That such a doctrine, repugnant to every honest feeling of the human heart, should soon be laid aside, must be expected. Accordingly, a variety of exceptions were soon made; and amongst others it was held, that if a person has any interest in the thing in dispute, though on con-

(*a*) 4 *T. R.* 340.
(*b*) *Co. Lit.* 214 *a.* 266 *a.* 2 *Roll.* 45. *l.* 40.
(*c*) *Bro. tit. Maintenance,* 7. 14. 17, &c.

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tingency only, he may lawfully maintain an action on it. (*a*) But in the midst of all these doctrines on maintenance, there was one case in which the courts of law allowed of an assignment of a *chose in action*, and that was in the case of the crown; for the courts did not feel themselves bold enough to tie up the property of the crown, or prevent that from being transferred. (*b*) Courts of equity from the earliest times thought the doctrine too absurd for them to adopt; and, therefore, they always acted in direct contradiction to it. And we shall soon see that courts of law also altered their language on the subject very much. In 12 *Mod.* 554. the Court speak of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties, and to which they must give their sanction, and act upon. So an assignment of a *chose in action* has always been held a good consideration for a promise. It was so in 1 *Roll. Abr.* 29. pl. 60. 1 *Sid.* 212., and *T. Jones*, 222.; and, lastly, by all the Judges of *England* in *Mouldsdale* v. *Birchall* (*c*), though the debt assigned was uncertain. After these cases we venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails." And innumerable exceptions have been engrafted on the old law of maintenance, which, if it were construed according to ancient rigour, would impede the whole course of modern business. [*Bosanquet* J. Could a claim for unliquidated damages arising out of a *tort* be assigned?] Perhaps, in some instances; as a claim for damages on the running down a ship; but not for *crim. con.* or slander. [*Park* J. The distinction seems not unreasonable, and consistent with morals and law.] Here there has been no assignment of any portion of the thing in dispute, but merely a covenant under which *Thomas Stanley* is

(*a*) 2 *Roll. Abr.* 115.
(*b*) 3 *Leon.* 198. 2 *Cro.* 180.
(*c*) 2 *Black.* 820.

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to receive a compensation for the trouble and expense of which the Defendant is to reap the benefit. There is nothing contrary to public policy in such an agreement, for *Stanley* could not interfere in or adopt the Defendant's suit. The definition given of maintenance, (of which *champerty* is a species,) in 1 *Russell on Crimes*, 266. is, "'an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hinderance of common right." This agreement is rather in furtherance than in disturbance of right. If this agreement be illegal, it must be equally illegal to collect debts for a commission to be paid according to the amount.

Russell. It is not contested that *choses in action* are now, in many instances, assignable; but an agreement like the present is not on that account the less illegal or the less mischievous. If it should be holden that in some instances even unliquidated damages are assignable, it would not follow that they might be assigned to a party who comes forward beforehand to support the action by which they are to be recovered. To uphold such an engagement would be productive of the worst consequences, and joint-stock companies might be formed to sue on speculation, and support claims by suborned testimony.

Cur. adv. vult.

TINDAL C. J. The question upon the present record is this — Whether the contract stated in the deed upon which the action is brought, is a legal contract, capable of being enforced by a court of law? The deed recites, that *Stanley* had given the Defendant reason to believe that certain representations made to him were false; and that *Stanley* being in possession of evidence to manifest the same, had agreed to communicate such evidence to the Defendant upon receiving from him a certain sum expended

expended in obtaining the same, and upon having an agreement by the Defendant to pay him one-eighth part of the clear amount of such sums as the Defendant should recover through the means of *Stanley*. The deed, then, contains a covenant by the Defendant to *Stanley*, to the effect of the agreement above recited.

The agreement, therefore, is, in effect, a bargain by a man who has evidence in his own possession respecting a matter in dispute between third persons, and who at the same time professes to have the means of procuring more evidence, to *purchase* from one of the contending parties at the price of the evidence which he so possesses or can procure, an eighth part or share of the sum of money which shall be recovered by means of the production of that very evidence. And we all agree in thinking such an agreement cannot be enforced in a court of law.

The offence of champerty is defined in the old books to be, the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it. That this was considered in earlier times, and in all countries, an offence pregnant with great mischief to the public, is evident from the provisions made by our own law in the statutes *Westminster* first and second, and from the language of the civil law, which was afterwards received as the law over the greater part of the continent. (*a*) The object of the law was not so much to prevent the purchase or assignment of a matter then in litigation, as the purchase or assignment of a matter in litigation for the purpose of maintaining the action, as is evident from Lord *Coke*'s reading on stat. *Westm.* 2. *c.* 49. (*b*), where he remarks, "True it is, that if any *other person*, (*i. e.* than the Chancellor, treasurer, and other persons men-

(*a*) See *Dig.* 48. 7. 6.

(*b*) 2 *Inst.* 484.

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tioned in the act,) purchase *bonâ fide* depending the suit, he is not in danger of champerty; but these persons here prohibited cannot purchase at all; neither for champerty or otherwise depending the plea;" evidently pointing to the distinction, that the offence of champerty consisted in purchasing an interest in the thing in dispute, with the object of maintaining and taking part in the litigation: and we see no reason to doubt that the offence of champerty, in this restricted sense, remains the same as heretofore. Courts of equity have, in various modern cases brought before them, held the offence still to exist. In *Stevens* v. *Bagwell* (*a*), where a bill was filed for the purpose, amongst other things, of declaring an agreement void which had been made by a seaman for the sale of his chance of prize-money to his prize-agents, who were to carry on the suit, the Master of the Rolls (Sir *W. Grant*) says, "I expressed at the hearing my opinion that the agreement was void from the beginning, as amounting to that species of maintenance which is called *champerty*, viz. the unlawful maintenance of a suit in consideration of a bargain for a part of the thing, or some profit out of it." (*b*)

Now in the present case, *Stanley* does purchase an interest in the subject matter of dispute, not in terms indeed, but in substance and effect, as he bargains distinctly for a share of the sum to be recovered. He does not indeed stipulate that he is to furnish money for the carrying on the suit, or that he is to carry it on himself; but he stipulates that "he should and would use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claims of the said Defendant." And if there is any difference

(*a*) 15 *Ves.* 139.

(*b*) See also 18 *Ves.*-junr. 126., and the opinion of the Master of the Rolls in 2 *Jacob & Walker's Rep.* 135.

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between this contract and direct champerty, it appears to us to be strongly against the legality of this contract; as, besides the ordinary objection, that a stranger to the controversy has acquired an interest to carry on the litigation to the uttermost extent, by every influence and means in his power, the bargain to furnish and to procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence, has a direct and manifest tendency to pervert the course of justice.

We therefore think, in this case, there ought to be judgment for the Defendant.

Judgment for Defendant.

RICHARD BOYMAN BOYMAN *v.* JOHN MATTHEW GUTCH.

THIS was an action of *assumpsit*, brought to recover the sum of 111*l.* and 10*l.* 15*s.* 11*d.* interest thereon, together with the costs for examining into the title of the Defendant to certain property sold by auction to the Plaintiff.

1. In *assumpsit* to recover money deposited upon a purchase, upon an allegation that the Defendant has failed to make a proper title, this Court will not consider whether the title is of a doubtful description, such as a court of equity would not compel an unwilling purchaser to take, but simply whether the Defendant has or has not a legal title to convey.

2. *S. P.*, who had a life-interest in some funded property, and in a leasehold house, with reversion to her son, joined with her son in assigning the property to the Defendant "to hold, receive, and take the leasehold, funds, and other premises, to the Defendant upon trust that he should receive, and convert the same into money; and for that purpose should at his own discretion sell the leasehold, and the *reversionary interest in the funds*; provided that he should not, during five years from the date of the deed, put in force the trusts declared of the premises in such manner as to deprive *S. P.* of her life-interest therein during that period:" Held, that at the end of the five years the Defendant had power to sell *S. P.*'s life-interest in the funds.

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The declaration contained two specical counts; the first of which stated, in substance, that Defendant, by his autioneers and agents in that behalf, on the 30th of *November* 1827, caused to be put up and exposed to sale by public auction, the life-interest of a widow lady represented to be of the age of fifty-eight years, in the sum of 760*l.* New 4 per cents, to commence on the 30th *July* 1828; also the reversion to the principal sum receivable upon the demise of the lady, provided any of her five children then living should survive her, who then were of the respective ages of between thirty-three and thirty-six, thirty-one, twenty-nine, twenty-seven, and twenty-four; upon and subject to the following amongst other conditions, that is to say,

Third condition; that the purchaser should pay down immediately a deposit of 20*l. per cent.* in part of the purchase-money, and sign an agreement to pay the remainder on or before the 21st of *December* 1827; but if, from any cause, the purchase should not be completed, interest should be paid on the balance of the purchase-money at the rate of 5*l. per cent.* up to the time of completing the purchase: that the purchaser should be entitled to all advantages from the hour of sale:

Fourth condition; that the purchaser should have a proper assignment of the property at his or her own expense, on payment of the remainder of the purchase-money agreeably to the third condition.

And the Plaintiff in fact said, that, on such exposure to sale as aforesaid, to wit, on the 30th of *November* 1827, the Plaintiff was declared to be and became the purchaser of the said life-interest and reversion, upon and subject to the aforesaid conditions, for a certain sum of money, to wit, the sum of 555*l.*; and then and there paid down 111*l.* as a deposit of 20*l. per cent.* in part of the said purchase-money, and then and there signed an agreement to pay the remainder of the purchase-

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chase-money on or before the 21st of *December* 1827: and thereupon afterwards, to wit, on, &c. in consideration that the Plaintiff, at the special instance and request of the Defendant, had then and there undertaken and faithfully promised the Defendant to perform and fulfil all things in the said conditions of sale contained on the part of the Plaintiff, as purchaser as aforesaid, to be performed and fulfilled, the Defendant undertook and then and there faithfully promised the Plaintiff to perform and fulfil all things in the said conditions mentioned on the part of the Defendant, as vendor as aforesaid, to be performed and fulfilled: but that, although the Plaintiff on the 30th of *November* 1827, and from thence until and upon the 21st of *December* 1827, and from thence hitherto, had been always ready and willing to perform and fulfil all things in the said conditions mentioned on his part and behalf as purchaser as aforesaid, to be performed and fulfilled, and to pay the remainder of the said purchase-money, and the expense of a proper assignment of the said life-interest and reversion, and to complete the said purchase, whereof the Defendant, on, &c. had notice, and was then and there requested by the Plaintiff to make him a proper assignment of the said life-interest and reversion, and to perform the said conditions, and his, the Defendant's, promise on his part, nevertheless the Defendant, not regarding his promise and undertaking, nor the said conditions of sale, then and there craftily and subtilly deceived the Plaintiff in this, to wit, that, at the time of the exposure to sale, and from thence until and upon the 21st *December* 1827, and from thence hitherto, the Defendant had not a good right or title to sell or assign, or cause to be assigned to the Defendant the life-interest and reversion, in pursuance of the conditions of sale, and did not, nor would at the time for completing the said purchase, or at any

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time before or since shew or make, or procure to be made to the Plaintiff a proper title to the said life-interest and reversion, or make or procure to be made such proper assignment as aforesaid, or shew a title enabling him to do so according to the said conditions, but wholly neglected and refused, &c.; by reason whereof the Plaintiff had been and was deprived of all benefits and advantages which would have arisen from the completion of the said purchase; and had been put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of 100*l.*, in endeavouring to procure such title and assignment as aforesaid, and to get the said purchase completed; and had lost all gains and profits which he might and would otherwise have made and acquired from using and employing the said sums of money so paid by him as a deposit as aforesaid, and other monies provided and kept by him the said Plaintiff for the completion of the said purchase.

The second special count stated in substance the putting up and exposure to sale of the said life interest and reversion, as in the first count mentioned; the Plaintiff's having become the purchaser thereof, under and subject to the said conditions; having paid the said sum of 111*l.* as a deposit; having signed the agreement in the first count mentioned, according to the said conditions; and that the said purchase not being completed, theretofore, to wit, on the 2d *February* 1828, it was mutually agreed by and between the Defendant and the Plaintiff, that the sale of the said life interest, and reversion, should be delayed until the month of *July* then next, on the terms that the Plaintiff should then pay the principal and interest on the balance of the said purchase-money; that the said deposit should be invested in an exchequer bill, to remain in the hands of the auctioneers; and that the said sale should be considered and treated as a new one at the time of completion in the

the month of *July*: and thereupon, mutual promises in conformity therewith, and breach by the Defendant.

The declaration also contained the usual common counts, and the general issue was pleaded.

At the trial of the cause before *Tindal* C. J., *London* sittings after *Trinity* term last, a verdict was found for the Plaintiff for the sums claimed, amounting to 141*l.* 15*s.* 11*d.*, subject to the opinion of the Court upon the following case: —

On the 30th of *November* 1827, the Defendant put up to sale by public auction the life interest of a widow lady, Mrs. *Sarah Anne Phippen*, in the sum of 760*l.* new 4 per cent. Bank Annuities, to commence on the 30th of *July* 1828; and also the reversion to the principal sum receivable upon her demise, provided any of her five children, then living, should survive her, subject to certain conditions of sale, amongst which were the following: — That the person who should become purchaser should immediately pay a deposit of 20*l.* per cent. in part of the purchase-money, and sign an agreement to pay the remainder on or before the 21st of *December* 1827; but that if, from any cause, the purchase should not then be completed, interest should be paid upon the balance of the purchase-money at 5 per cent. up to the time of completing the purchase, and, that the purchaser should be entitled to all advantages from the hour of sale; and, also, that the purchaser should have a proper assignment of the property at his own expense, on payment of the remainder of the purchase-money.

At the sale the Plaintiff became the purchaser of that property at the sum of 555*l.*, and paid immediately into the hands of the Defendant's agents, the auctioneers, the sum of 111*l.*, being the proper deposit of 20*l.* per cent. upon the purchase-money, and for the recovery of which, with the interest, this action was brought.

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An agreement was also then entered into on the part of the Plaintiff, for the payment of the remainder of the purchase-money pursuant to the condition of sale above mentioned.

The Defendant, on the 13th of *December* 1827, furnished to the Plaintiff's attornies an abstract of title to the said lifehold interest and reversion, in which was a copy of the deed hereinafter set out, and from which the title of the Defendant to sell the said life interest, and also the said reversionary interest, was alone derived.

By that deed, made the 29th of *July* 1823, between *James Phippen* of the city of *Bristol*, merchant, *Sarah Anne Phippen* of the same city, widow, *John Phippen* of *Pimlico*, in the county of *Middlesex*, accountant, and *Elizabeth Phippen*, *Mary Phippen*, and *Hannah Phippen*, all of the said city of *Bristol*, spinsters, of the one part, and *John Matthew Gutch* of the city of *Bristol*, of the other part, [after reciting that *William Phippen*, late of *Bristol*, accountant, deceased, duly made and published his will, bearing date the 21st of *August* 1818, and thereby gave and devised unto his friends *Joel Morcom* and *William Knight*, of the city of *Bristol*, all that messuage and dwelling-house and outhouses at *Butcombe*, with the several pieces and parcels of ground thereto belonging and appertaining, and also all those closes called *Church Closes*, upon trust, to sell, dispose of, and convey the same, either together or by parcels, as to them or him should seem best, the proceeds to be placed out at interest on good and sufficient security, either government or otherwise, for the benefit of his said wife during her natural life, and at her decease to call in and divide the same equally between all his children then living; that the testator then gave to his wife his leasehold dwelling-house wherein he resided, together with all the furniture therein

therein for and during her natural life, and after her decease to her three daughters, *Elizabeth*, *Mary*, and *Hannah*, for the joint benefit of two only, if one should marry, and the same for one if two should marry, unless the last remaining unmarried daughter should give consent in writing to the trustees therein named, (to whom he gave and devised the same in trust,) for the purpose of the whole being disposed of and equally divided between all his children then living; that the testator departed this life without revoking his said will, which in the month of *March* 1820 was duly proved by the said *Joel Morcom* and *William Knight*, the executors therein named, in the episcopal court of *Bristol*; that the hereditaments at *Butcombe*, mentioned in the testator's will, having been sold, the net proceeds were invested in government securities, and now consisted of the sum of 760*l.*, or some other sum new 4 per cent. Bank Annuities; that the said *James Phippen* was indebted to the said *John Matthew Gutch* in the sum of 185*l.* for money lent, advanced, and paid on his account; that the said *John Matthew Gutch* had also become a security for the said *James Phippen*, guaranteeing the due payment by him to Messrs. *Ricketts* and Co., bankers, *Bristol*, of the further sum of 300*l.*, which amount the said *John Matthew Gutch* had been called on to discharge; and that the said *James Phippen* being unable to make good and provide for the aforesaid debts and demands, the said *Sarah Anne Phippen*, *John Phippen*, *Elizabeth Phippen*, *Mary Phippen*, and *Hannah Phippen* had agreed to join with him in making such security to the said *John Matthew Gutch* as was hereinafter contained]; it was witnessed that, for the considerations aforesaid, and also in consideration of the sum of 10*s.* to each of them paid by the said *John Matthew Gutch*, they the said *James Phippen*, *Sarah Anne Phippen*, *John Phippen*, *Elizabeth Phippen*, *Mary Phippen*, and *Hannah Phippen* bar-

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gained, sold, assigned, transferred, and set over, unto the said *John Matthew Gutch*, his executors, administrators, and assigns, all that the said sum of 760*l.*, or other the sum whatsoever in the 4 per cent. Bank Annuities produced by the sale of the said hereditaments at *Butcombe* as aforesaid, and the dividends and annual produce of the same; and also all that the said leasehold dwelling-house mentioned in the will of the said testator, situate and being in the city of *Bristol*, with the appurtenances thereto belonging, then in the occupation of the said *Sarah Anne Phippen*; and all the renewable and other estate, term and terms of years, and all the right, title, and interest, legal and equitable, vested and contingent, in possession, reversion, remainder, or expectancy of them the said *James Phippen*, *Sarah Anne Phippen*, *John Phippen*, *Elizabeth Phippen*, *Mary Phippen*, and *Hannah Phippen*, in and to the same premises, with full power, as their and each of their attorney and attornies, to demand, sue for, and recover the same, and every part thereof; to have, hold, receive, and take the said leasehold hereditaments, monies, funds, securities, and other premises thereinbefore assigned or intended so to be, unto the said *John Matthew Gutch*, his executors, administrators, and assigns, upon the trusts thereinafter contained, that is to say, upon trust that the said *John Matthew Gutch* should *receive and convert the same into money*, and for that purpose should at his discretion, and without further authority, *sell and dispose of the said leasehold dwelling-house, and of any reversionary and contingent interest in the said stocks*, funds, and securities, either by public or private sale, and should convey the same to a purchaser: and it was declared, that *John Matthew Gutch* should stand possessed of all monies which should come to his hands by virtue of those presents, upon the trusts following; that is to say, upon trust, in the first place, to reimburse himself all costs and

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and charges which he should incur in and about the execution of the trusts thereby created; and, in the next place, upon trust, that the said *John Matthew Gutch*, his executors, or administrators should thereout or otherwise be paid and satisfied the said sum of 185*l.* with interest at 5 per cent., to be calculated thereon from the date thereof, and also all such part of the said sum of 300*l.* guaranteed to the said Messrs. *Ricketts* and Co. as the said *John Matthew Gutch*, his executors, or administrators should be called on to pay, and should pay, with like interest on such payment; and subject to the said trusts, that the said *John Matthew Gutch*, his executors, administrators, and assigns should stand possessed of the said premises in trust for the said *James Phippen*, *Sarah Anne Phippen*, *John Phippen*, *Elizabeth Phippen*, *Mary Phippen*, and *Hannah Phippen*, their executors and administrators respectively, according to their respective rights and interests therein. And the said *James Phippen*, *Sarah Anne Phippen*, *John Phippen*, *Elizabeth Phippen*, *Mary Phippen*, and *Hannah Phippen* did for themselves, their heirs, executors, and administrators, and each of them did for himself and herself, his and her heirs, executors, and administrators, covenant and agree with the said *John Matthew Gutch*, his executors, administrators, and assigns, that they the said *James Phippen*, *Sarah Anne Phippen*, *John Phippen*, *Elizabeth Phippen*, *Mary Phippen*, and *Hannah Phippen*, or one of them, should and would forthwith pay to the said *John Matthew Gutch* the said sum of 185*l.*, and also all such part of the said sum of 300*l.* as the said *John Matthew Gutch*, his executors or administrators should be called on to pay, and should pay, with interest on the same several sums after the rate aforesaid, and that, without any deduction or abatement whatsoever. Covenant for further assurance, and that *Gutch*'s receipts should be a discharge to purchasers. Provided always, and it was thereby lastly

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declared, that the said *John Matthew Gutch*, his executors, administrators, and assigns should not, during *the term of five years* from the date of those presents, exercise or put in force the trusts declared of the premises thereinbefore assigned to him, in such a manner as to deprive the said *Sarah Anne Phippen* of her life interest therein during the said period.

Some objections having been raised to the Defendant's power to sell the property, it was agreed that the completion of the purchase should be delayed till *July* 1828, the deposit being invested in exchequer bills, and the purchaser paying interest on the balance of the purchase-money. The deposit was accordingly invested, and the title of the Defendant to sell continued to be discussed by the Plaintiff's and the Defendant's solicitors, and further opinions were taken and mutually communicated. An assignment or conveyance had not yet been made of the property sold by the Defendant, but the Defendant had always been ready and willing to make and execute an assignment to the Plaintiff of the life-interest and reversion in pursuance of the particulars and conditions of sale, and in conformity with the stipulations for delaying the completion of the purchase till *July* 1828, as far as the powers contained in the deed enabled him so to do.

The Plaintiff contended, among other things, that by the deed above set out, the Defendant had no title to or power to sell the life-interest of Mrs. *S. A. Phippen* in the sum of 760*l.* new 4 per cents., and could not convey the same to the Plaintiff; and the Defendant contended that the deed gave him the power to sell, and also to convey such life-interest to the purchaser.

If the Court should be of opinion that the Plaintiff was entitled to recover, the verdict was either to stand for the sum of 141*l.* 15*s.* 11*d.*, or to be reduced to the sum of 121*l.* 15*s.* 11*d.*, as the Court should direct; but

if

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if the Court should be of opinion that the Plaintiff was not entitled to recover, a verdict was to be entered for the Defendant.

Several points were discussed in the argument of the case, but the decision turning solely on the Defendant's power to sell *Sarah Anne Phippen*'s interest in the funded property, the report is confined to that.

Wilde Serjt. for the Plaintiff. The deed does not authorize the Defendant to sell *Sarah Anne Phippen*'s life-interest in the funded property. The mother and her children join in assigning to the Defendant the sum in the funds, and the dividends and annual produce of the same, and also the leasehold dwelling-house; to hold, receive, and take, the leasehold hereditaments, monies, funds, securities, and other premises to the Defendant, upon trust that he should receive and convert the same into money; and for that purpose, at his discretion, and without further authority to sell and dispose of the *leasehold dwelling-house*, and of the *reversionary and contingent interest in the stocks*, funds, and money. The explanation and limitation of the expression, *to receive and convert the same into money*, is afforded by the sentence which follows, from which it appears that the words must be taken *reddendo singula singulis*; that is the *dividends* are to be *received* during the life of *S. A. Phippen*, and the *leasehold premises* and *reversionary* interest in the stocks to be converted into money. Such being the express directions, a more general authority cannot be implied, for powers of this kind are construed strictly.

At all events, it is *doubtful* whether the more extensive authority can be implied in the face of such an express limitation; and if so, the Court will not compel a purchaser to take a questionable title, and incur the hazard of purchasing a law-suit. In *Curling* v. *Shuttleworth*,

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worth (*a*), where it was questionable whether the power existed under which the vendor assumed to sell, *Tindal* C. J. said, "Supposing the power to have been only suspended, there may be a candid doubt how far that suspension may be considered to operate in a court of equity, and if there be a reasonable degree of doubt, this Court will not expect the purchaser to proceed." And *Burrough* J. said, "If there be reasonable doubt as to a title, we cannot compel a purchaser to take it." [*Alderson* J. That case has been questioned in the Court of King's Bench.] The same principle has been acted on in *Elliott* v. *Edwards* (*b*), *Wild* v. *Fort* (*c*), *Blosse* v. *Clanmorris* (*d*), and other cases.

Russell Serjt. *contrà*. The whole argument on the other side rests on the ambiguity occasioned by the use of the word *reversionary*. But the word (perhaps inartificially used) still may be applied for the purpose of giving effect to the manifest intention of the whole deed; either, first, by considering the interest after the *five years* to have been treated by the person who framed the deed as a reversionary interest; and contingent also, for the life might have determined in the interval; or, secondly, if the word *reversionary* must be taken only as applicable to interests of the children, then the whole clause may be considered as intended to direct an immediate sale, and as if the word *forthwith* had been used; leaving the selling the life-interest of the mother at a future time, and after the five years, to the general words *receive, and convert into money*. Even if the words *reversionary* and *contingent* raise an ambiguity, this should not control the clear meaning and intention of the deed. All the property is assigned together, and without distinction: the object is to pay

(*a*) 6 *Bingh.* 134. (*b*) 3 *B. & P.* 181.
(*c*) 4 *Taunt.* 334. (*d*) 3 *Bligh*, 62.

debts.

debts. The mother joins with the others in the covenant to pay the money, which liability is scarcely reconcilable with the slow progress of payment by receipt of dividends after five years. And how is the Defendant to convert all the premises into money except by sale?

The proviso, beyond all question, contemplates a sale; and the contribution by the mother would be unequal, if only the dividends of her stock, after five years, were to be taken, and the interests of the others should be entirely sold. Being all sureties (except *James Phippen*), they ought to contribute in proportion to their respective interests; and if the life-estate be not sold, the greater part of the burthen would fall upon the reversionary interests. No reasonable doubt, therefore, can be raised on the title offered by the Defendant; and the question is not, whether doubt can oe raised, but whether the Defendant offers a marketable title. In *Romilly* v. *James* (*a*) *Gibbs* C. J. says, "It is said that the Plaintiff will have made out his claim to recover back his deposit if a cloud is cast on the title. That is not so in a court of law; he must stand by the judgment of the Court, as they find the title to be, whether good or bad; and if it be good in the judgment of a court of law, he cannot recover back his deposit. If he had gone into a court of equity, it might have been otherwise: I know a court of equity often says, this is a title which, though we think it available, is not one which we will compel an unwilling purchaser to take; but that distinction is not known in a court of law."

Wilde. According to the more recent authorities (*b*), no court will compel a purchaser to take a title if it be open to a fair doubt. As to the deed's having been executed

(*a*) 6 *Taunt.* 274. (*b*) Collected in *Sugd. V. & P.* 314.

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executed with a view to the discharge of the son's debts, the remainder of the premises might have been sufficient, without the sacrifice of the mother's life-interest in her stock.

Cur. adv. vult.

TINDAL C. J. This was an action of assumpsit, in which the Plaintiff has assigned, as the breach of contract by the Defendant, that at the time of the exposure of the property in question to sale, the Defendant had not a good right or title to sell or assign to the Plaintiff, the life interest, and reversion therein mentioned, in pursuance of the conditions of sale, and did not make out a proper title to the same. The title of the Plaintiff to this property depends upon the construction of the trust deed of the 29th of *July* 1823, and we are therefore called upon to say, what the construction of that deed is; whether it does authorize the Plaintiff to put up to sale, and to sell the property in question, or not. We are not to consider ourselves as a court of equity, where the seller is seeking to enforce the purchase by bill for a specific performance; in which case that Court frequently refuses the aid of its authority to enforce a performance, where the title is of an unmarketable or even doubtful description; leaving the party to his action at law for damages; but we are called upon to answer the simple question on this record, whether on the construction of a deed, the Defendant has or has not a legal title to convey to a purchaser; and although the deed appears to be inartificially framed, we think, upon the proper construction of it, the Defendant has, and at the time of the exposure to sale, had, good right and title to sell and assign to the Plaintiff, and consequently that the present action, grounded on that breach of contract, cannot be maintained.

It appears by the recital in the deed, that *Sarah Anne Phippen*

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Phippen had a life interest in a certain sum in the funds, and also in a leasehold dwelling-house, and the furniture thereof, with a contingent reversionary interest therein to such of her children as should be living at the time of her decease, and that *James Phippen*, one of the children, having become indebted to the Defendant, the said *Sarah Anne Phippen*, and all her children, had agreed to join in the assignment to the Defendant, as a security for the debt of the son. The mother and the children then join in assigning to the Defendant all the said sum in the funds, and the dividends and annual produce of the same, and also the leasehold dwelling-house, and all their renewable interest therein, "To hold, receive, and take the leasehold hereditaments, monies, funds, securities, and other premises, to the said Defendant, upon trust that the said Defendant should receive and convert the same into money."

Now if the deed had stopped at this place, little doubt could have been raised, but that the intention of the parties was, that the Defendant should convert *all the premises*, that is, the funded property amongst the rest, into money; which could be effected only by a sale thereof. But it is contended that the direction which follows restrains this general authority to sell from applying to the funded property; for the deed states, "And for this purpose the said Defendant shall at his discretion, and without further authority, sell and dispose of the said *leasehold dwelling-house*, and of any reversionary and contingent interests in the said stocks, funds, and securities." And it is contended that the manifest implication of this clause is, that the Defendant was not to dispose of the funded property during the wife's life, at his own discretion, and without further authority. But the answer appears to be, that however this might have been, if the last clause had stood alone, yet the proviso at the end of the deed supplies the direction as to the wife's interest for her life; for it is thereby

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thereby provided that the said Defendant shall not, *during the term of five years* from the date of the indenture, exercise or put in force the trusts declared of the premises, in such manner as to deprive the said *Sarah Anne Phippen* of her life interest therein, *during the said period*; implying, that after the expiration of the term of five years the Defendant might put the trusts in execution. The interpretation of the clauses, taken together, appears, therefore, to be, that the Defendant was not to dispose of the wife's interest until after the expiration of the term of five years, unless further directions were given within that period. But here the sale took place after the expiration of the five years. The sale by auction appears, therefore, to have been a legal act. And this is further confirmed by the express declaration of the trusts as to the monies raised by sale of the premises. For the deed states, that the Defendant shall stand possessed of the monies which come to his hands by virtue of the said indenture, in trust for the said *Sarah Anne Phippen*, and the said several children, their executors and administrators, according to their respective rights and interests therein. Now it never could be intended that the Defendant should be interested in these monies to be raised by the sale of the wife's estate, without having a power of sale thereof.

It therefore appears to us that the Defendant had, at the time this life-interest was exposed to sale, the right to put the same up to sale, and to sell the same. Whether a court of equity would compel a purchaser to accept such a title, is a question which we are not called upon to determine. All that we profess to determine is, the legal construction of the deed, which appears to us to negative the allegation above set forth in the declaration. We therefore think there was no defect of title in the Defendant, and, consequently, that the judgment must be for the Defendant.

Judgment for Defendant.

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WORRALL *v.* JAMES JONES, WILLIAM BAKER, and EDWARD JONES.

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A party to the record is a competent witness, provided he be disinterested.

DEBT on bond, conditioned for the payment of rent by *Edward Jones*, as tenant to the plaintiff, pursuant to an agreement made in *January* 1806.

The two *Jones's* suffered judgment by default, and *Baker* pleaded, that the tenancy under the agreement ceased in *March* 1816, up to which time all rent had been paid. The issue to be tried was, whether the tenancy under the agreement had ceased.

At the trial before *Bosanquet* J., *London* sittings after *Easter* term last, the Plaintiff called *Edward Jones*, one of the Defendants, as a witness, to prove that his tenancy under the agreement of 1806 continued to 1829.

His testimony was objected to, on the ground that he was a party to the record, but *Bosanquet* J. received it, subject to a motion to this court as to its admissibility, and the Plaintiff recovered a verdict.

Merewether Serjt. obtained a rule *nisi* for a new trial, on the ground that the witness had been improperly received. He relied on *Chapman* v. *Graves* (*a*), where *Le Blanc* J. said, "The general rule is, that a party to the record is not admissible as a witness. In the case of *Ward* v. *Heydon*, the defendant was called to exculpate the other defendant; here it is proposed to call a co-defendant to inculpate the others; the cases, therefore, are distinguishable." And he was not disposed to extend the innovation on the rule. In *Emmet* v. *Bradley* (*b*), three of five defendants pleaded bankruptcy, and

(*a*) 2 *Campb.* 333. n. (*b*) 1 *B. M.* 332. 7 *Taunt.* 599.

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the evidence having established their plea, it was proposed to enter a verdict for them forthwith, and to call them as witnesses, to shew that the other two were not joint contractors; but the evidence was rejected. And in *Mant* v. *Mainwaring* (*a*), a co-defendant, who had suffered judgment by default, was not allowed to be called as a witness to shew that the other defendants were his partners. *Burrough* J. said, "The general rule is, that no party to an action can be examined but by consent; and all the parties to the record must consent."

A rule having been granted,

Wilde Serjt. shewed cause. The principle to be extracted from all the cases is, that a party to the record is excluded, not because he is a party to the record, but because he is an interested witness; from which it follows, that should a case occur in which he is not interested, in such case he is admissible as a witness. Subject to this interpretation, it may be said to be a rule, that a party to the record is incompetent as a witness, because it generally happens that he is interested. In *Emmett* v. *Bradley*, the question turned chiefly on the point, whether the Judge ought to have stopped the cause to enter the verdict for three of the defendants; and in *Mant* v. *Mainwaring*, the proposed witness was interested, because he would have had a claim for contribution if he had proved the other defendants his partners. The witness in the present case could not claim contribution, because he was the principal debtor, and the other two defendants his sureties. In *Norden* v. *Williamson* (*b*) a plaintiff was received as a witness, with the consent of the defendant, although he came to

(*a*) 2 *B. M.* 9. 8 *Taunt.* 139. (*b*) 1 *Taunt.* 378.

defeat

defeat the claim of a co-plaintiff. In *Brown* v. *Fox* (*a*), the party who was called, had an interest to defeat the action. In *Ward* v. *Haydon* (*b*), the defendant, having no interest, was admitted. In *Raven* v. *Dunning* (*c*), he was excluded, because he was liable to the costs of the action. In *Doe* v. *Green* (*d*), having no interest, he was admitted. In *Brown* v. *Brown* (*e*), being entitled to contribution if the plaintiff succeeded, he was excluded. In *Mash* v. *Smith* (*g*), he was admitted. For the same reason, in an action against a corporation, members of the corporate body are admissible; *Weller* v. *Foundling Hospital.* (*h*) And in *Buller's Nisi Prius*, 98, (*Ejectment*), it is laid down, that if a material witness for the defendant be made co-defendant, the proper course is to let judgment go by default.

Merewether. *Norden* v. *Williamson* was a case of consent; the other cases, in which the party has been admitted, are all cases of tort, in which each defendant is separately liable; or *Nisi Prius* decisions, which ought not to weigh against a rule established from the earliest period, and expressly recognised in bank in *Emmett* v. *Bradley* and *Mant* v. *Mainwaring*. Besides, if a party to the record be admitted as a witness in chief, he is exposed to a cross-examination under which he may be compelled to make admissions prejudicial to himself; a practice at variance with the first principles of the *British* constitution.

At all events, the witness in the present case was interested, for he was called to support a lease, under

(*a*) 1 *Phil. Ev.* 75.
(*b*) 2 *Esp. N. P. C.* 552.
(*c*) 3 *Esp. N. P. C.* 25.
(*d*) 4 *Esp. N. P. C.* 198.
(*e*) 4 *Taunt.* 752.
(*g*) 1 *Carr. & P.* 577.
(*h*) *Peake, N. P. C.* 153.

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which he would have two sureties responsible for him, instead of being solely liable to his landlord.

Cur. adv. vult.

TINDAL C. J. In this case of debt on bond, conditioned for the payment of rent and performance of agreements by *Edward Jones*, one of the Defendants, he, and the Defendant *James Jones*, suffered judgment by default; the only Defendant who pleaded in bar to the action was *William Baker*; and the issue raised upon his plea was, whether the tenancy had continued during the time the rent was alleged to have become due.

At the trial of this issue, the Plaintiff proposed to call the said *Edward Jones* as a witness to prove the continuance of the ancient tenancy. No objection could arise on the ground that *Edward Jones* was interested to procure a verdict for the Plaintiff, who called him; inasmuch as, being the principal debtor, he could not call for contribution from the other Defendants, but must himself be ultimately liable both to the damages and costs recovered in this action. The witness did not himself object to be examined, but an objection was made on the part of *William Baker*, the Defendant who had pleaded; and the question reserved for our consideration is, whether a Defendant, who has suffered judgment by default, and who consents to be examined, is an admissible witness, where he has no interest in the event of the suit; and the only objection to his admissibility is this, — that he is a party upon the record. And upon this question we are of opinion that the evidence was admissible.

No case has been cited, nor can any be found, in which a witness has been refused, upon the objection in the abstract, that he was a party to the suit: on the contrary, many have been brought forward, in which parties to the suit,

suit, who have suffered judgment by default, have been admitted as witnesses against their own interest; and the only enquiry seems to have been, in a majority of the cases, whether the party called was interested in the event or not: and the admission or rejection of the witness has depended on the result of this enquiry.

The exclusion on the ground of *interest* is a known principle of the law of evidence: and so much did Lord Chief Baron *Gilbert* consider this as the only solid objection against the evidence of a party to the suit, that after laying it down as a general rule, that no man interested in the matter in question can be a witness for himself, he states, that several corollaries may be deduced from this rule; of which he gives as the first, — "That the plaintiff or defendant cannot be a witness in his own cause; for these are the persons who have a most immediate interest, and it is not to be presumed that a man who complains without cause, or defends without justice, should have honesty enough to confess it." (*a*)

That a party to the record should not be *compelled* against his consent to become a witness in a court of law, is a rule founded in good sense and sound policy; it forms the point of the decision in the case of *The King* v. *Woolburn* (*b*), and the decision of that case leads to the necessary inference, that if the party consents to be examined, he is then an admissible witness. We think, therefore, where the party to the suit, who has suffered judgment by default, waives the objection and consents to be examined, and is called against his own interest, there is no ground, either on principle or authority, for rejecting him. The present rule, therefore, should be discharged.

Rule discharged.

(*a*) See *Gilbert's Law of Evidence*, 130. 4th edit.

(*b*) 10 *East*, 395.

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HEWITT *v.* PIGOTT.

A new trial having been granted, the Court allowed the Plaintiff to have inspection of a deed read in evidence by the Defendant at the first trial.

THIS was an action against the sheriff of *Somerset* for a false return of *nulla bona* to a writ of *fi. fa.* issued against the goods of Lord *Egmont*.

The defence set up was, that the goods were the property of trustees, in whom they had been vested *bonâ fide* for the benefit of creditors under two deeds executed in 1823.

One of these deeds was read in evidence at the trial, and the execution of the other was admitted; but it was not given in evidence. A verdict having been found for the Plaintiff, and a rule for a new trial, on the ground of surprise, having been made absolute,

Cross Serjt., on the part of the Plaintiff, obtained a rule *nisi* for an inspection of these deeds, on the ground that when they were produced at the trial, the Plaintiff might have read them, or, at all events, have taken down the language of that which was read by the Defendant; so that the documents must now be considered as equally accessible to both parties.

Wilde Serjt. opposed the rule, on the ground that these were the muniments of the Defendant, or of those under whose indemnity he resisted this action; and that a party could not be compelled to exhibit his muniments, unless it could be shewn that he held them, in some sort, as trustee for his opponent.

TINDAL C. J. There is a distinction between the two deeds. The first was read, and heard by the Court and

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and jury; and when the Defendant moved for a new trial, there would have been no injustice in imposing on him, on granting a new trial, the condition of producing that deed for the inspection of the Plaintiff: but the second deed was withdrawn, although the execution of it was admitted. It must be taken, therefore, as one of those muniments of the Defendant which the other party has no right to inspect before trial. Justice will be satisfied by the production of the first deed.

PARK J. The first deed must be considered as if it were now in Court; the second, as if the cause had never been tried; and in general a party is not bound to exhibit his muniments to an adversary.

The rest of the Court concurring, the rule was made Absolute, as to the deed which had been read in evidence.

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PRICE *v.* SEVERN.

The general issue having been pleaded to an action of assault, and a new trial having been ordered on payment of costs, after a verdict for the Plaintiff, the Defendant was not allowed to withdraw the general issue, and plead accord and satisfaction.

THE rule for a new trial in this case having been made absolute on payment of costs, (see *ante*, p. 316.), the Defendant obtained an order from a Judge at chambers to withdraw the general issue, and plead accord and satisfaction.

Adams Serjt. moved to discharge the order, on the ground that it tended to harass a Plaintiff with two trials for one cause of action. It was inexpedient to allow a Defendant to take his chance on a general issue, and if that failed, then to try a special plea. Although a new count was sometimes allowed after verdict, yet it was only to state the same cause of action in a different way; whereas this plea raised an issue which could not have been tried as the record stood at first.

Goulburn Serjt. supported the order, on the ground that the new trial having been granted on payment of costs, the Plaintiff was in the same situation as if he were going to trial for the first time.

But *The Court* was clearly of opinion, that the order ought not to have been made. The plea raised an entirely different issue; and if it had been pleaded at first, might have deterred the Plaintiff from proceeding with his action. As to the new trial having been granted on payment of costs, those costs included only the costs of the former trial. The antecedent expenses were still in hazard.

Rule discharged.

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TAYLOR *v.* THOMPSON.

Jan. 31.

THE prothonotary having allowed the costs of a view in this cause,

The costs of a view cannot be allowed, unless the writ contain the name of a shewer appointed by the Defendant as well as by the Plaintiff.

Russell Serjt., after verdict and judgment, moved, on behalf of the Defendant, that the taxation of costs might be reviewed, on the ground that the writ for the view did not contain the name of any shewer appointed by the Defendant, nor had any shewer been appointed by him.

Wilde Serjt. opposed the motion, as coming too late. The party should have moved to set aside the proceedings.

TINDAL C. J. The act of parliament (*a*) expressly directs that a shewer on each side shall be named in the writ. As the Defendant never authorized this view by naming one of the shewers, it must be taken as if there had been no view.

Rule absolute.

(*a*) 6 G. 4. *c.* 50. *s.* 23.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the First Year of the Reign of WILLIAM IV.

1831.

SHILLITO *v.* THEED.

April 23.

THIS was an action on a bill of exchange for 185*l.* drawn by *T. M. Lee* in 1829, payable at seven months after date; accepted by the Defendant; indorsed by *Lee* to *Giles*; by *Giles* to *Smallpage*; and by *Smallpage* to the Plaintiff.

Held: that the Plaintiff though an indorsee for valuable consideration, could not recover on a bill given in payment of a bet above 10*l.* lost at a legal horse race.

At the trial before *Tindal* C. J., *London* sittings after last *Michaelmas* term, it appeared that the Defendant had accepted the bill for the amount of a bet which he had lost on the issue of the *St. Leger* stakes at *Doncaster* races in 1828. The *St. Leger* stakes are more than 50*l.*

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The Plaintiff gave *Smallpage bonâ fide* the full consideration for the bill, and had no notice of the circumstances under which it had been accepted.

On the part of the Defendant it was objected, that the bill, having been accepted in payment of a bet of more than 100*l.* on the issue of a horse-race, was void under the stat. 16 *Car.* 2. *c.* 7. *ss.* 2. & 3., even in the hands of a *bonâ fide* holder for good consideration. And on this ground a verdict was found for the Defendant, with leave, however, for the Plaintiff to move to set it aside, and enter, instead, a verdict for 185*l.*

Jones Serjt. moved accordingly in *Hilary* term.

By 16 *Car.* 2. *c.* 7. *s.* 3. it is enacted, "That if any person or persons shall play at any of the said games (*a*), or any other pastime, game, or games whatsoever, (other than with or for ready money), or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, or other thing or things so played for, exceeding the sum of 100*l.* at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party and parties who loseth or shall lose the said monies or other thing or things so played or to be played for, above the said sum of 100*l.*, shall not in that case be bound or compelled or compellable to pay or make good the same; but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and

(*a*) By the second section, "cards, dice, tables, tennis, bowles, kittles, shovel-board, cock-fightings, horse-races, dog-matches, foot-races, or other pastimes, game or games whatsoever."

securities

securities whatsoever, which shall be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for the same, or any part thereof, shall be utterly void and of none effect:"

And by 9 *Ann. c.* 14. *s.* 1., after first reciting that, "whereas the laws now in force for preventing the mischiefs which may happen by gaming have not been found sufficient for that purpose, for the further preventing of all excessive and deceitful gaming" it is enacted, "That all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such game or betting as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall during such play so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; any statute, law, or usage to the contrary thereof in any wise notwithstanding:" and by sect. 5. "That if any person or persons whatsoever, do or shall by any fraud or shift, cosenage, circumvention, deceit, or unlawful device or ill practice whatsoever, in playing at or with cards, dice, or any the games aforesaid, or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others,

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any sum or sums of money, or other valuable thing or things whatsoever, or shall, at any one time or sitting, win of any one or more person or persons whatsoever above the sum or value of 10*l.*, that then every person or persons so winning by such ill practice as aforesaid, or winning at any one time or sitting above the said sum or value of 10*l.*, and being convicted of any of the said offences upon an indictment to be exhibited against him or them for that purpose, shall forfeit five times the value of the sum or sums of money, or other thing so won as aforesaid; and in case of such ill practice as aforesaid, shall be deemed infamous, and shall suffer such corporal punishment as in cases of wilful perjury."

But by 13 *G.* 2. *c.* 19. *s.* 5., followed by 18 *G.* 2. *c.* 34., it is enacted, "That no person or persons whatsoever shall start or run any match with or between any horse, mare, or gelding for any sum of money, plate, prize, or other thing whatsoever, unless such match shall be started or run at *Newmarket Heath*, in the counties of *Cambridge* and *Suffolk*, or *Black Hambleton*, in the county of *York*, or the said sum of money, plate, prize, or other thing, be of the real and intrinsic value of 50*l.* or upwards; and in case any person or persons shall start or run any such match at any other place than *Newmarket Heath* or *Black Hambleton* aforesaid, or for any plate, prize, sum of money or thing of less value than 50*l.*, every such person or persons shall forfeit and lose the sum of 200*l.*:"

Although, therefore, this bill might have been void under the statutes of *Car.* 2. and 9 *Ann.*, which latter statute has been holden to apply to horse-races as well as the statute of *Car.* 2., yet the statutes of *G.* 2. having legalized horse-racing for a stake of 50*l.* and upwards, the Plaintiff is entitled to recover.

At

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At common law a party might recover for a bet not prohibited by public policy or morals, or too frivolous for the investigation of a court. *Johnson* v. *Bann* (*a*), *Good* v. *Elliott.* (*b*) The legality of wagers on innocent topics is established by the practice of feigned issues; and a wager on a horse-race for 50*l.* and upwards, is a wager on a subject not only innocent, but sanctioned by the statutes of *G.* 2.

With respect to races, therefore, for such a stake, those statutes operate as a repeal of the statute of *Car.* 2., and there is no decision adverse to this position; for in *Goodburn* v. *Marley* (*c*), *Clayton* v. *Jennings* (*d*), and *Blaxton* v. *Pye* (*e*) the bets were, for aught that appears to the contrary, on horse-races for stakes less than 50*l.*, and so, illegal under 16 *Car.* 2. and 9 *Ann. c.* 14.; and in *Lynall* v. *Longbottom* (*g*) and *Brown* v. *Berkely* (*h*) the wagers were on foot-races, illegal under the same statutes. But in *M'Allester* v. *Haden* (*i*), it has been expressly decided, that a wager under 10*l.* on a horse-race for 100*l.* is legal.

At all events, even if the objection should prevail as against parties to the bet, it would be most mischievous to the circulation of the country to decide that the bill is void in the hands of a *bonâ fide* holder without notice.

A rule *nisi* having been granted,

Bompas Serjt. now shewed cause.

Although the statutes of *G.* 2. have legalised horse-racing under certain regulations, they have in no way

(*a*) 4 *T. R.* 1.
(*b*) 3 *T. R.* 706.
(*c*) 2 *Str.* 1159.
(*d*) 2 *Bl.* 706.
(*e*) 2 *Wils.* 309.
(*g*) 2 *Wils.* 36.
(*h*) *Cowp.* 282.
(*i*) 2 *Campb.* 438.

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repealed the prohibition of betting contained in the statute of *Charles*; and the encouragement of horse-racing by adequate stakes for the purpose of improving the breed of horses, is perfectly compatible with the prohibition of betting or gambling, which can have no tendency to further that object of the legislature. In *Bac. Abr. Gaming*, p. 343., it is laid down, that it is "immaterial to consider whether the game itself be lawful or not; if a man loses 10*l.* by playing or betting at it, it is within the statute." In *Clayton* v. *Jennings* it was held, that betting at a horse-race to the amount of above 10*l.*, was within the statute of 9 *Anne*; and if the bet be lawful on one side, and unlawful on the other, (as a bet of ten guineas to five), neither can be recovered for want of mutuality. In *Bowyer* v. *Brampton* (*a*) it was holden, that the innocent indorsee of a note given on a gaming transaction, can maintain no action against the drawer; and *Whaley* v. *Pajot* (*b*) is an authority to shew that the statute is to be construed strictly.

Jones. That position is not contested. The question is, whether a bet of more than 10*l.* on a particular species of race, which would be a legal subject for a wager at common law, and which race is sanctioned by the statutes of *G.* 2., is a bet still illegal under the provisions of earlier statutes against bets of more than 10*l.* on horse-races generally; and if it be so, whether a bill accepted for such a bet be void in the hands of a *bonâ fide* holder without notice.

TINDAL C. J. This is an action on a bill of exchange drawn by *Lee* on *Theed* for the payment of a wager of 185*l.* on the *St. Leger* stakes, which, it is admitted,

(*a*) 2 *Str.* 1155 (*b*) 2 *B.* & *P.* 54.

were

were a legal horse-race; and the question is, whether, on the construction of the several acts of parliament, the indorsee can recover. It is unnecessary, in the first instance, to go farther than 16 *Car.* 2. *c.* 7., which declares horse-racing illegal, and in *s.* 3. enacts, "That if any person or persons shall play at any of the said games, or any other pastime, game or games whatsoever, (other than with and for ready money,) or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, or any thing or things so played for, exceeding the sum of 100*l.* at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party and parties who loseth or shall lose the said monies or other thing or things so played or to be played for above the said sum of 100*l.*, shall not in that case be bound or compelled, or compellable to pay or make good the same; but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements and other acts, deeds, and securities whatsoever, which shall be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for the same, or any part thereof, shall be utterly void and of none effect."

The bill on which the Plaintiff sues exceeds 100*l.*; was given for a sum lost at a horse-race; and, if there were no other provision of the legislature, would be void under that which has been referred to. But it is urged that, by subsequent acts, horse-races under certain restrictions have been legalised; and, therefore, incidentally and collaterally, bets upon such races.

That, however, not only does not follow necessarily,

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but would be at variance with the intention of the legislature as expressed in those acts. The title of the first, 13 *G.* 2. *c.* 19., is "An act to restrain and prevent the excessive increase of horse-races; and for amending an act made in the last session of parliament, intituled an act for the more effectual preventing of excessive and deceitful gaming." It then goes on to render certain races legal, if the sum of 50*l.* and upwards be run for, the object of the legislature being to promote improvement in the breed of horses by affording an adequate object of competition. But that can have nothing to do with the practice of betting, which may be carried on by idle persons standing by, who have no interest whatever in the horses; while the clause which requires that the horse shall be entered to run in the name of the owner, shews that it was not proposed to give others an interest in the race. Then comes the 18 *G.* 2. *c.* 34., intituled "An act to explain, amend, and make more effectual the laws in being, to prevent excessive and deceitful gaming, and to restrain and prevent the excessive increase of horse-races;" and the act goes on to say, that "nothing in this act contained shall extend or be construed to extend to repeal or invalidate an act made in the ninth year of the reign of her late majesty Queen *Anne*, intituled *An Act for the better preventing excessive and deceitful gaming;*" it incorporates also many of the provisions of 16 *Car.* 2., which cannot be said to be repealed. *Goodburn* v. *Marley* was decided shortly after the 13 *G.* 2., and yet it never was contended that a wager exceeding 10*l.* on a horse-race was legal. Although, therefore, a wager not exceeding 10*l.* might be legal, on a legal horse-race, yet a wager exceeding that sum on a horse-race, whether legal or illegal, is void; and, consequently, there is no ground for setting aside the verdict.

PARK J.

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PARK J. I am of the same opinion. It is clear that horse-racing is included in the games prohibited by the statute of 16 *Car.* 2., and that the bet in this case falls within the provisions of *s.* 3. of that act.

The statute of *G.* 2. only permits horse-racing *sub modo*, and for the encouragement of the breed of horses, which, it is clear, betting could in no way promote.

GASELEE J. The preamble of both the acts of *G.* 2. shews that they were designed to check the increase of horse-racing.

ALDERSON J. I do not say whether a wager under 10*l.* would be legal, but it is quite clear that this is illegal, and therefore the rule must be

Discharged.

GODEFROY *v.* JAY.

April 20.

The Defendant, an attorney, was sued for negligence in allowing judgment to go by default in an action which the Plaintiff had retained him to defend: the negligence being proved, Held, it was for the attorney to defend himself by shewing, if he could, that the Plaintiff had no defence in that action, and not for the Plaintiff to begin by shewing he had a good defence, and so had been damaged by the judgment by default.

ACTION against an attorney for negligence. The third count of the declaration, on which alone the Plaintiff relied, was as follows: —

That heretofore, to wit, on, &c. at, &c. the Plaintiff, at the special instance and request of the Defendant, retained and employed him, the Defendant, as his attorney, for certain fees and rewards to be therefore paid by the Plaintiff to the Defendant in that behalf, to defend a certain action then depending in the Court of King's Bench, at the suit of *Stephen Dubois* against him, the Plaintiff, for an alleged injury done by

him

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him the Plaintiff, to a certain son and servant of him, the said *Stephen Dubois:* and the Defendant then and there accepted the last-mentioned retainer: and, thereupon, it then and there became, and was the duty of the Defendant as such attorney so retained as aforesaid, well, faithfully, diligently, and skilfully to act as the attorney of the Plaintiff in and about the defending the said last-mentioned action: yet the Defendant, well knowing the premises, but neglecting and disregarding his duty in that behalf, and contriving and intending to injure the Plaintiff, did not well, faithfully, diligently, and skilfully act as the attorney of and for the Plaintiff, in and about the defending of the said last-mentioned action, but, on the contrary thereof, then and there conducted himself so carelessly, negligently, and unskilfully with respect to the defence of the said last-mentioned action, and in discharge of his duty as the attorney of and for the Plaintiff, that, by reason of such negligence, carelessness, and want of skill of the Defendant, and by and through the mere neglect and default of the Defendant afterwards, to wit, on, &c. at, &c., judgment by default was signed against him, the Plaintiff, in the said last-mentioned action; and such further proceedings were had in the said last-mentioned action, that afterwards, to wit, in *Easter* term, in, &c., it was considered and adjudged in and by the said Court of King's Bench, that *Stephen Dubois* should recover against the Plaintiff a certain large sum of money, to wit, the sum of 30*l.* 10*s.*, and thereupon execution was afterwards, to wit, on the 9th of *May* 1826, to wit, at, &c., issued upon the said last-mentioned judgment against the Plaintiff; and the Plaintiff, in order to satisfy the said execution, was afterwards, to wit, on, &c. at, &c. forced and obliged to pay, and actually did pay to the said *Stephen Dubois* in satisfaction of the said judgment, the money so recovered as last aforesaid; and also another

another large sum of money, to wit, the sum of 5*l.*, being the costs and expenses of and occasioned by the said execution; and was also forced and obliged to incur, and actually did incur a further great expense amounting to a further large sum of money, to wit, the sum of 50*l.*, in and about endeavouring to defend himself against the said action; and was greatly injured in his credit and character; and put to great loss, costs, charges, trouble and expense, and inconvenience in and about, and greatly interrupted and hindered in carrying on his affairs and business, to wit, at, &c.

At the trial before *Tindal* C. J., *Middlesex* sittings after last *Michaelmas* term, the case proved was in substance as follows: — The Plaintiff *Godefroy*, a dyer, having been sued by one *Dubois* for running over his child, the Defendant *Jay* was applied to by *Hatton*, an agent of *Godefroy's*, to conduct *Godefroy's* defence.

Hatton informed *Jay* that notice of *Dubois's* declaration had been served on *Godefroy's* son instead of *Godefroy* himself; upon which *Jay* observed, that the service was bad, and that the proceedings might be set aside at any time. *Hatton* rather inclined against that course, but said, "I leave Mr. *Godefroy* in your hands;" when *Jay* said, "I will see that justice shall be done him." Shortly after this, *Godefroy* being served with a writ of enquiry in the action brought against him by *Dubois*, applied to *Jay* on the subject. *Jay*, who had taken no step in the cause, told him it was of no consequence, for the service of process having been bad, the judgment could be set aside at any time. *Jay* or his clerk then took the declaration out of the office; but nothing further being done, the writ of enquiry was executed, and no person attending on the part of *Godefroy*, the damages were assessed at 31*l.* 10*s.*

A writ of *fi. fa.* was afterwards issued, indorsed to levy that sum, under which an officer seized *Godefroy's* goods,

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goods, and kept possession of them for some days, when the money was paid by *Godefroy*, together with 5*l.* the expenses of the levy.

A verdict in the present action having been given for *Godefroy* with 45*l.* damages,

Cross Serjt., pursuant to leave given at the trial, moved for a rule to reduce this verdict to nominal damages, on the ground that *Godefroy* had not shewn that he had been wronged by the judgment by default in *Dubois* v. *Godefroy*; or for a new trial, on the ground that the 45*l.* damages were at all events excessive. A rule *nisi* having been granted,

Bompas Serjt. shewed cause. The Plaintiff having shewn, in the first instance, that the judgment by default in *Dubois* v. *Godefroy* was the result of negligence in the defendant, and having so established a *primâ facie* case, it was for the Defendant, if he could, to shew affirmatively that that judgment, though ensuing on his neglect, would also have been warranted by the circumstances of the cause; and it was not for the Plaintiff, after establishing his *primâ facie* case against the Defendant, to go on and shew negatively that there was no ground for the judgment by default; or that he did *not* run over the child, as he was accused by *Dubois*. *Ross* v. *Hunter* (*a*), *Lee* v. *Ayrton* (*b*), *Aitcheson* v. *Madock* (*c*), *Swannell* v. *Ellis*.. (*d*)

It is not to be presumed he was guilty of a wrongful act. *Williams* v. *East India Company*. (*e*)

In the absence, therefore, of any evidence on the part of the Defendant, the Plaintiff has established his case, and the damages are little more than was actually paid

(*a*) 4 *T. R.* 38.
(*b*) *Peake N. P. C.* 161.
(*c*) *Peake N. P. C.* 218.
(*d*) 1 *Bingh.* 347.
(*e*) 3 *East*, 192.

under

under the judgment of default, which was suffered through the negligence of the Defendant.

Cross. No action of *tort* lies for mere negligence unaccompanied with assignable damage. It was for the Plaintiff, therefore, to shew, that he had been injured by the judgment by default. [*Tindal* C. J. *Marzetti* v. *Williams* (*a*) was an action of *tort* arising out of the breach of an implied contract, and the plaintiff was allowed to recover, although he proved no damage.] The plaintiff's banker in that case had dishonoured the check of the plaintiff, who was a person in trade; that circumstance could not but injure the plaintiff's credit, and the jury did not find that no damage had been incurred. But suppose an attorney to fall asleep, or leave the court without reason during the trial of his client's cause, and a verdict to be given for the client notwithstanding: Would the attorney be liable in an action for negligence? Or, suppose a ship-broker to neglect effecting an insurance which he was instructed to effect: Would he be liable for negligence if the ship arrived safe? The Plaintiff, therefore, in the present case, should at least have offered *some* evidence to shew that he would have been better off if judgment by default had not been suffered in *Dubois* v. *Godefroy*. But, for aught that appears to the contrary, the suffering judgment by default might have been, with a view to the saving of costs at least, the most advantageous course for him; and he has not shewn any neglect by the Defendant of his general duty as an attorney. It does not appear that the Plaintiff furnished the Defendant with any instructions for a defence upon the merits; that he offered to produce witnesses; or that he did not, upon conference, concur in the propriety of letting judgment go by default: his agent, indeed, expressed a disinclination to take advan-

(*a*) 1 *B.* & *Adol.* 415.

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tage of the technical defect of service. His attorney, therefore, was bound to exercise his discretion in the conduct of the cause. A general agent has authority to exercise his discretion for the benefit of his employer (*a*); and an attorney, who is a deputy, cannot have less power than his principal. (*b*) If the Plaintiff had no defence on the merits against *Dubois*, the general issue, not guilty, would have been a false plea, and neither in law nor in morality would the Defendant have been exercising a sound discretion in pleading it. The propriety of such a practice even by prisoners, when guilty, has been questioned by many. By the statute of *Beaupleader*, 3 *Ed.* 1. *c.* 23. "no serjeant counter, nor any other," (which extends to attornies, 2 *Inst.* 234.) "shall do any manner of deceit to beguile the Court," under penalty of imprisonment for a year and a day. And it is within this statute if an attorney plead a false plea. (*c*) If he plead a sham plea he is liable to be fined. (*d*) And he may refuse to do so, when instructed, *Johnson* v. *Alston*. (*e*) In *Godefroy* v. *Dalton* (*g*) it was held, that *crassa negligentia* must be proved to render the attorney liable.

TINDAL C. J. It appears to me that this verdict ought not to be disturbed. The application is, in effect, for a new trial on the third count of the declaration, for the two first may be considered as having been abandoned. The third count alleges the retainer of the Defendant by the Plaintiff, and his duty to act skilfully and diligently in defending the action, and then avers that the Defendant conducted himself so carelessly, negligently, and unskilfully in the defence of the action, and in discharge of his duty as attorney, that by his negli-

(*a*) *Per Buller* J. 1 *B.* & *P.* 323.
(*b*) *Per Holt* C. J. *Salk.* 95.
(*c*) 2 *Inst.* 215.
(*d*) *Per Holt* C. J. 2 *Salk.* 515.
(*e*) 1 *Campb.* 176.
(*g*) 6 *Bingh.* 460.

gence,

gence, carelessness, and want of skill, judgment was signed against the Plaintiff for 30*l.* 10*s.*, and execution issued for the amount, which the Plaintiff was obliged to pay, together with 5*l.* costs: and the question is, whether the gravamen is made out by the evidence at the trial. However, it has first been thrown out on behalf of the Defendant, that no action lies for negligence unless the Plaintiff shew special damage. But that proposition is wider than the law warrants; for in an action of tort arising out of a breach of contract, or neglect of a duty which the law imposes, nominal damages are sufficient to entitle the Plaintiff to judgment. This is the rule of law, and it has recently been recognised and acted on in *Marzetti* v. *Williams*. It is unnecessary, however, to discuss that point in the present case, because damages have been found, occasioned by the negligence of the Defendant, to the amount of 45*l.* In what did that negligence consist? *Godefroy* being sued by *Dubois*, puts the conduct of his cause into the hands of the Defendant *Jay*; and upon *Godefroy*'s agent saying, "I leave the matter in your hands," *Jay* answers, "I will do you justice." When, after that, he suffers judgment to go by default, without even consulting his client, or taking any step to set the judgment aside, is that, or is it not, negligence? It has been urged that it was his duty not to plead where there was no defence, and we have been referred to the statutes of *Beaupleader*: but the object of those statutes is to prevent a party from putting on the record, pleas containing affirmative matter which is false; the legislature never intended to take from the Defendant the right of putting the Plaintiff on the proof of his case, whether the demand itself were admitted or denied; and it is often necessary to plead the general issue, in order that the amount of damage sustained may be fairly ascertained. It is contended, however, that an attorney may use his own discretion, and abstain from

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from incurring the expense of a plea where his client has no substantial defence. But nothing of that kind appears to have passed in the mind of the present Defendant; for he seems to have thought that he could set aside the judgment by default at any time, on account of the original defective service of the process. Suffering judgment, then, was not a matter prudential on his part, but took place because he relied on setting the judgment aside. In that he was under a mistake; and the question is, whether he was not thereby guilty of a breach of duty, by which he prevented his client from defending himself, and mitigating the damages sought at his hands; a breach of duty which deprived him of the benefit of cross-examination to which he was by law entitled, and of the effect of observations to be made to the jury.

Then comes the question, whether these damages are excessive: that depends on the question, whether it was the duty of *Jay*, the Defendant in this action, to adduce evidence to shew that *Godefroy* the Plaintiff was not damnified by the judgment by default in the former action, or whether it was for *Godefroy* to establish that *Dubois* would not have recovered against him. According to all the cases, it was not to be expected that *Godefroy* should be called on to furnish such proof. On both points, therefore, this rule falls to the ground.

PARK J. I am of the same opinion. The position, that special damage ought to be shewn, to entitle the Plaintiff to recover in an action of tort, is not correct. The contrary has been established by the recent case of *Marzetti* v. *Williams*; and that is not a new decision, for it has always been holden, that when an action arises substantially on a contract, any breach is sufficient to entitle the Plaintiff to nominal damages. In *Green* v. *Greenbank* (*a*), an action substantially on a contract,

(*a*) 2 *Marsh*, 485.

though,

though, in form, on a tort, it was held, that where the substantial ground of action was *contract*, the Plaintiff could not, by declaring in *tort*, render a person liable who would not have been liable on his promise.

Marzetti v. *Williams*, however, is decisive on the point; and there is no ground for the distinction which has been attempted between that case and the present, which is substantially an action of *assumpsit*, and in which special damage has actually been shewn. I do not agree in the position, that an attorney has a discretion to put in no plea where there is no defence. An attorney is bound in such a case to plead the general issue, although reprehensible if he plead one of those affirmatively false statements sometimes termed horse-pleas. Nor can I concur in what has been dropped on the subject of prisoners' pleading not guilty: on the contrary, I approve of the practice of exhorting them so to plead; for a prisoner, unless so advised, often pleads guilty to an offence charged as capital, which, if investigated, would turn out to be of a less aggravated nature. Then, although it has been contended, that it does not appear but that *Godefroy* was consulted as to the judgment by default, the contrary may be collected from the evidence: the rule, therefore, must be discharged.

GASELEE J. *Marzetti* v. *Williams* is not a single decision: six or seven authorities are cited in the case, to shew that a plaintiff may recover upon the breach of an express or implied contract without shewing special damage.

If the third count in this declaration be defective, the objection is on the face of the record; but it appears to me that a motion in arrest of judgment would be unsuccessful; the duty of the Defendant is alleged in the usual way, and the breach of it discloses a sufficient ground of action.

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GODEFROY v. JAY.

With regard to the evidence, it is impossible for us to presume that the judgment by default was suffered with the concurrence of *Godefroy*, when *Jay* is proved to have said, "I can set it aside at any time;" and there is no evidence to shew that he ever declined to defend for want of sufficient instructions. There is no weight in the argument that it is the duty of an attorney not to plead the general issue, where he has no defence to the action: in cases where the defendant admits he has no defence, it is every day's practice to plead the general issue, in order that the damages may be ascertained before a judge of assize, instead of being less perfectly enquired into by the under-sheriff. The Defendant *Jay* should, at least, have attended the writ of enquiry, to attempt a reduction of *Dubois*'s claim; his neglect in that matter is a breach of duty for which the Plaintiff is entitled to recover.

ALDERSON J. This is a very plain case. An attorney is retained to defend a cause, and does nothing; and the question is, whether that is not negligence for which he is responsible to his client. If he had any special reason which would justify him in doing nothing, it was for him to shew it in answer to this action. With respect to the amount of damages, it was not for the Plaintiff *Godefroy* to shew, in this action, the circumstances under which he was sued by *Dubois*. If there were no witnesses of the occurrence which led to that action, it would have been impossible for him to do so; and if *Dubois* had witnesses, *Jay* might have called them to establish his defence in this action. Negligence, therefore, has been proved against him, and he has failed to shew that it was immaterial to the Plaintiff.

Rule discharged.

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COLLINS and Others *v.* GWYNNE.

April 20.

By 43 *G.* 3. *c* 99. the bond given to the commissioners by a collector of taxes is to be conditioned for demanding the taxes, enforcing the provisions of the act, and paying the sums collected to the receiver-general. The Defendant was sued on a bond which contained those conditions, and also a condition for accounting and paying to the commissioners: Held, that this latter condition might be rejected as surplusage, and did not avoid the bond.

DEBT on the following bond: —

"Know all men by these presents, That we, *Richard Bigg* the younger, of the parish of *St. Matthew Bethnal Green*, in the county of *Middlesex*, coal merchant, *Samuel Cardozo* of the same parish, gentleman, and *Lawrence Gwynne* of *Teignmouth*, in the county of *Devon*, doctor of laws, are jointly and severally held, and firmly bound to *James Collins*, *John Burnell*, and *Joseph Merceron*, esquires, three of the commissioners appointed, among others, for putting in execution the several acts of parliament made, and now in force, for granting an aid to his majesty by a land-tax for the service of the year 1828, and for granting to his majesty the several rates and duties of assessed taxes, acting in and for the Tower division, within the said county of *Middlesex*, in the penal sum of 4048*l.* of lawful money of *Great Britain*, current in *England*, to be paid to the said *James Collins*, *John Burnell*, and *Joseph Merceron*, some or one of them, their, some or one of their certain attorney, executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselves, and each of us by himself, for the whole, our, and every of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the 27th day of *August*, in the year of our Lord 1828."

The condition being set out on *oyer* was as follows:—

"Whereas the above bounden *Richard Bigg* hath been duly nominated and appointed by the commissioners appointed for putting in execution the said acts of parliament, within the said division and county, one of the collectors of the rates and duties above-mentioned,

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rated, laid, and assessed upon the parish of *St. Matthew, Bethnal Green*, in the Tower division, in the county of *Middlesex* aforesaid, for the year 1828, ending respectively the 25th day of *March* and the 5th day of *April* 1829; now the condition of this obligation is such, that if the above bounden *Richard Bigg* do and shall well and faithfully *demand* and collect all and every the sum and sums of money in the said assessments charged and specified, of the respective persons from whom the same shall or may be payable; and shall and do, in case of non-payment thereof, duly *enforce* the powers of the said acts against such persons who may make default therein; and also well and truly *pay*, or cause to be paid, unto the *receiver-general* of the said taxes, rates, and duties for the said county of *Middlesex*, all such sum and sums of money as shall come to the hands of the said *Richard Bigg* as such collector, upon the days, and at the times, by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts; and also do and shall, when thereunto required, at such times and places as shall be appointed for that purpose, give and render, or cause to be given and rendered, unto the commissioners appointed or to be appointed to put the said acts in execution, or to any two of them, a just and true account in writing of all such sum and sums of money which he the said *Richard Bigg* shall have collected and received by virtue or on account of the said assessments; and shall forthwith *pay and* deliver the same unto the said commissioners, or any two of them, or unto such person or persons as they, or any two or more shall appoint, then this obligation to be void, or else to remain in full force and effect."

Breach, that the Defendant did not demand and collect; did not enforce the act; did not pay to the receiver-general, or account to the commissioners.

To which the Defendant pleaded, first, that the Plaintiffs

Plaintiffs were not damnified; secondly, that if damnified, they were damnified by their own wrong.

To these pleas there was a special demurrer, in support of which,

Taddy Serjt. alleged that this was not an indemnity bond, and therefore the pleas were ill (*a*), — when it appeared that the Defendant excepted to the declaration, and

Wilde Serjt., on his behalf, contended that the bond was void. The obligors describe themselves as acting under two different statutes, — the assessed tax act, 43 *G.* 3. *c.* 99., and the land tax act, 38 *G.* 3. *c.* 5. *s.* 21. It does not appear that the same body of commissioners is empowered to carry both those acts into effect, although they are to be qualified in the same way; and the conditions and amount of penalty imposed on collectors by the land tax act differ from those imposed by the assessed tax act. (*b*) There

(*a*) 1 *Wms. Saund.* 17. n. (1.)

(*b*) By 43 *G.* 3. *c.* 99. *s.* 4. it is enacted, "That no person shall act as a commissioner in the execution of any act or acts before mentioned unless such person shall be duly qualified as required by an act passed in the thirty-eighth year of the reign of his present majesty, intituled An Act to alter and amend so much of an act passed in the present session of parliament, intituled *An Act for granting an aid to his majesty by a land-tax to be raised in* Great Britain *for the service of the year* 1798, as relates to the qualification of commissioners:"

And by section 13. "That such persons as shall be presented to the said commissioners as before directed to be collectors, shall, if required so to do, give good and sufficient security to any two or more of such commissioners, equal to the amount of the whole *duty* and sum and sums of money assessed on and to be collected in each district or place as aforesaid by such collectors respectively, for their *duly paying such monies assessed as aforesaid, as shall come to their hands, and for their duly demanding the sums assessed of the respective persons from whom the same are payable; and in case of nonpayment thereof, their duly enforcing the powers of this act* against such who make default; which security the said commissioners, or any two or more of them, are hereby authorized and empowered to take, by a joint and several bond, with two

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There should have been a separate bond under each act. At all events, the payment of the money collected is to be made to the receiver-general of the county, and not to the commissioners. A bargain between the collector and commissioners, to pay to the commissioners, would be a breach of duty in both; the latter branch of the condition, therefore, being to that effect, the bond is void.

Taddy. By sect. 13. of the assessed tax act, it is required that the collector's bond shall be conditioned for payment of the monies that come to their hands; for demanding the sums charged; and for duly enforcing the provisions of the act. Those conditions the bond has; and the addition of the condition to pay to the commissioners, which is repugnant and absurd, and has crept in by mistake, will not vitiate the whole bond. The bond is only void for the excess. In *Collins* v. *Blantern* (*a*) *Wilmot* J. says — "It is said the statute is like a tyrant, — where he comes he makes *all* void; but the common law is like a nursing father, — makes only void that part where the fault is, and preserves all the rest." In *Norton* v. *Simmes* (*b*) it was held, that in a bond conditioned for the performance of covenants, some of which were void, and some not, the objection stands good for the covenants that are good, but not for the others.

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sureties at the least, to and in the names of any two or more of such commissioners, in such penal sum as aforesaid, and with a condition thereto to the effect before mentioned."

And by 38 *G.* 3. *c.* 5. *s.* 21. it is enacted, "That such persons as shall be nominated as before directed to be collectors, shall, if required so to do, give good and sufficient security to any three or more of the commissioners appointed for carrying this act into execution, equal to the amount of the whole *rate* to be collected in such district, *for their duly paying to the receiver-general such monies assessed as aforesaid as shall come to their hands;* which security the said commissioners, or any three or more of them, are hereby authorized and empowered to take."

(*a*) 2 *Wils.* 351.

(*b*) *Hob.* 14.

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TINDAL C. J. It appears to me that judgment must be given for the Plaintiff on these pleas. The question, however, does not turn so much on the pleas as on the bond. The rule of law is, that if a bond be conditioned for the performance of a thing *malum in se*, or against a positive law, not only is the condition void, but the bond also; and the question is, whether the condition of this bond is for the performance of a thing *malum in se*, or contrary to the statute under which the bond is taken. If the condition had been solely to pay the commissioners, it would have imported an illegal act, and the bond would have been void. But it becomes unnecessary to consider that, because there is a separate condition under which the obligor is to pay to the receiver-general. I cannot see why we are to call in aid a distinct condition, which may be illegal, to vitiate that which is clearly legal. The amount of penalty prescribed by the statute is only directory.

PARK J. concurred.

GASELEE J. It appears on the declaration that the commissioners under both acts are the same. There is no provision in the act that the bond shall be taken in any particular form, and the condition to pay to the commissioners does not render the whole bond void. In *Newman* v. *Newman* (*a*), Lord *Ellenborough* C. J. said, "Admitting the condition of the bond to be ill as to one part of it, it seems that it may be well as to the other parts; for you may separate at the common law the bad from the good."

ALDERSON J. concurring, the Court gave

Judgment for the Plaintiffs.

(*a*) 4 *M.* & *S.* 66.

1831.

April 18. MOLLOY *v.* DELVES.

The acceptance was written on a bill of exchange before the bill was drawn. The declaration described the transaction in the usual order of time; the drawing first, and then the acceptance:
Held, no variance.

INDORSEE against acceptor. The declaration, in the usual form, alleged the bill to have been drawn and then accepted: at the trial, it was proved that the acceptance was written before the bill had been drawn.

A verdict having been found for the Plaintiff,

E. Lawes Serjt. moved to set it aside, and enter a nonsuit on the ground of a variance, admitting that the Plaintiff might have recovered if the transaction had been described in the declaration according to the fact. But

The Court at once overruled the objection, and

E. Lawes

Took nothing.

April 16. THURGOOD *v.* RICHARDSON and Another.

1. A landlord who sued a sheriff for not reserving a year's rent on an execution against a tenant, released the rent after the jury were sworn, to make the tenant a witness:
Held, that he was not thereby precluded from recovering against the sheriff the amount of the rent.

2. The statute 11 *G.* 2. *c.* 19. which gives the landlord an action against the sheriff in such a case, applies to the case of lessee and under-tenant, as well as to the case of landlord and lessee.

THIS was an action against the sheriff, for levying an execution on the goods of a tenant of the Plaintiff, at the suit of a third person, without retaining a year's rent which the sheriff had been apprized was due from the tenant to the Plaintiff. The declaration stated, that

one

one *John Perry* held, used, occupied, and enjoyed certain rooms and apartments and premises in and parcel of a certain messuage or dwelling-house, with the appurtenances, as tenant thereof to the Plaintiff, at and under a certain rent or sum of money therefore payable by the tenant to the Plaintiff for the same, to wit, at, &c.; and that theretofore, to wit, on, &c. a large sum of money, to wit, the sum of 36*l.* for and on account of the rent so payable by the said tenant to the Plaintiff for the rooms and apartments and premises for a long time, to wit, for one year, of the said tenancy, which ended at and upon that day, became and was due and payable, and continually from thence hitherto had been and still was in arrear and unpaid, to wit, at, &c.: that the said sum of 36*l.* of the rent so being in arrear and unpaid by the said tenant to the Plaintiff as aforesaid, afterwards, to wit, on, &c. at, &c., the Defendants, then being sheriff of the county of *Middlesex*, by virtue and under pretence of a certain writ of execution, to wit, a *fieri facias*, against the said tenant at the suit of one *George Humberstone Mitchelmore*, out of the Court of King's Bench before that time sued forth and prosecuted, and directed to the sheriff of the said county of *Middlesex*, took the goods and chattels of the said *John Perry*, then being in the said rooms and apartments and premises, with the appurtenances, so in the tenure and occupation of the said *John Perry* as tenant thereof as aforesaid, to a large amount, to wit, beyond the amount of the said arrears of rent so due and owing from the said tenant to the Plaintiff, that is to say, to the amount of 40*l.* And the Plaintiff further said, that after the taking of the goods and chattels so being in the said rooms and apartments and premises, with the appurtenances as aforesaid, and before the removal of the same under pretence

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pretence of the said writ, that is to say, on, &c. at, &c. the Plaintiff gave notice to the Defendants so being the said sheriff, of the aforesaid rent so being due and in arrear to the Plaintiff from the said tenant as aforesaid, and then and there requested the Defendants, that he the Plaintiff might be paid his rent so due, in arrear, and unpaid as aforesaid, before the said goods and chattels, or any part thereof, should be removed from or out of the said rooms and apartments and premises, with the appurtenances: yet the Defendants, well knowing the premises, but not regarding the duty of their said office, nor the statute in such case made and provided, but contriving and wrongfully and deceitfully intending to deceive and defraud the Plaintiff in that respect of the said rent so due to him as aforesaid, and of his the Plaintiff's remedy for the recovery thereof, under colour and pretence of the said writ, to wit, on, &c. at, &c. wrongfully, injuriously, and deceitfully removed and carried away the said goods and chattels so taken as aforesaid from and out of the said rooms and apartments and premises, with the appurtenances, so holden by the said tenant, contrary to the form of the statute in such case made and provided, without paying or satisfying the Plaintiff the said rent so due and owing and in arrear to him as aforesaid, or any part thereof: and the Plaintiff further said, that he had not at any time since been paid or satisfied the said rent, or any part thereof, but the same and every part thereof was due, in arrear, and unpaid from the said tenant to the Plaintiff, whereby he the Plaintiff had been and was deprived of the benefit of a distress for the recovery and satisfaction of the said rent so due and owing, and was in great danger of losing the same, to wit, at, &c.

At the trial before *Tindal* C. J., *Middlesex* sittings after

after *Hilary* term, it appeared that the Plaintiff was lessee for years of a house, two rooms of which he had underlet to the tenant in question, and the tenant was called as a witness for the Plaintiff, when, it being objected that he was interested, the Plaintiff, after the jury were sworn, gave him a general release.

A verdict was thereupon obtained for the amount of the rent claimed, with leave for the Defendants to move to enter a verdict for nominal damages instead, on the ground that the Plaintiff, having released his demand for rent, had no longer any claim against the sheriff.

E. Lawes Serjt. now moved accordingly, suggesting that the release amounted to the same thing as if the tenant had paid the rent in court, in which case it would have been impossible to contend that the Plaintiff could proceed for damages.

TINDAL C. J. It seems to me that there is no ground for this application. This is an action against the sheriff for a breach of duty, in not reserving for the landlord a year's rent upon an execution levied against his tenant. If the tenant had paid the rent subsequently to the action, the landlord would have been entitled to nominal damages only; and the question is, whether a release given to the tenant after the jury were sworn is equivalent to the payment of rent. We must look to the substance of the transaction. It is the misconduct of the Defendant which renders the release necessary, and the release does not prejudice him in any respect. The verdict therefore ought to stand.

PARK J. The release was extorted by the Defendant after the action had been rendered necessary by his misconduct. It would be gross injustice if he could so elude the verdict.

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GASELEE and ALDERSON J. J. concurred.

E. Lawes then moved, in arrest of judgment, that the statute which enables the landlord to claim a year's rent of the sheriff, 11 *G.* 2. *c.* 19. *s.* 19., and which is not to be extended in construction, *Hoskins* v. *Knight* (*a*), applies only to the case of an immediate tenant, upon an original demise of entire premises, and not to the case of an under-tenant; otherwise a lessee, by subletting to a number of separate occupiers, might defeat as many executions as he had rooms in his house.

TINDAL C. J. He can only have one year's rent of the whole house, although let out in separate rooms; so that there is no hardship on judgment creditors; and his position is in no respect altered, because he can only have against each separate execution the rent of the tenant against whom it is levied. It would be a very narrow construction of the act, if we were to confine it to the case of an original demise of entire premises. And though it appears on the record that the taking here was only of part of a messuage, the jury were satisfied at the trial that it was a separate taking.

Rule refused.

(*a*) 1 *M.* & *S.* 245.

1831.

Dean and Chapter of ELY *v.* CALDECOTT.

April 18.

ASSUMPSIT for copyhold fines. The question was, whether, a fine having been paid by a tenant for life, another fine was payable by the remainder-man in respect of the same property when he came into possession.

A book in which the steward of a manor entered the fines assessed, as well those paid as those unpaid, Held, not evidence for the lord of the manor, to shew what fines had been paid, although the steward had received it from his predecessor, and it was accessible to all the tenants.

At the trial before *Alderson* J., last *Suffolk* assizes, the Plaintiff, to prove the payment of fines by remainder-men, proposed to give in evidence a book in the possession of the steward of the manor, which he had received from his predecessor many years before, and which had always been kept with the other muniments of the lord of the manor. This book contained entries of all fines assessed, whether paid or not paid: it was accessible to the copyholders at large; but the steward made up a second book at the end of each year, in which he entered the fines which he had received.

The learned Judge declined to receive the book in evidence. A verdict was found for the Plaintiffs, subject to the opinion of this Court on a special case; but

Storks Serjt., in the mean time, with a view to get entries from this book introduced into the case, moved for a new trial on behalf of the Plaintiffs, on the ground that the book had been improperly rejected. He contended, that it ought to have been received, as an ancient document coming from the proper custody; as a public writing, accessible to all the tenants of the manor; as a record of the manor court; and as containing entries adverse to the interest of the steward, who, after entering the fines, was bound to account for them.

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Dean and Chapter of ELY v. CALDECOTT.

TINDAL C. J. I think the book in question was properly rejected. It appeared to be a book in which entries were made of assessments of fines, as well of those which were paid as of those which were unpaid; and it was proposed to give it in evidence to prove the payment of fines. But how are we to say, whether the fines were ever paid or not? The evidence is purely conjectural. Nor can it be said that the book contains evidence of the steward's having charged himself; for it appears he made up a second book at the end of each year, in which he put down the fines which had been actually paid. It would be exceedingly dangerous to admit the book in question; for if it were admissible, a steward might, by a series of entries, increase the extent of the tenants' liability.

The rest of the Court concurred, and *Storks*

Took nothing.

April 30.

POPKINS, Gent. One, &c. *v.* SMITH.

Where an irregularity in process is amendable as of course, the Court will not set aside the process, even though it be by attachment of privilege.

SPANKIE Serjt. had obtained a rule *nisi* to set aside the attachment of privilege and bail-bond in this case, for the irregularity of not having fifteen days between *teste* and return.

Andrews Serjt. shewed cause. This is a defect which the Court has frequently amended: *Davis* v. *Owen* (*a*), *Tidd's Practice*, 153. and the cases there cited: and where amendment is a matter of course, the Court will not set aside the proceedings. *Walker* v. *Hawkey*. (*b*)

(*a*) 1 *B.* & *P.* 342. (*b*) 5 *Taunt.* 853.

Spankie

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POPKINS v. SMITH.

Spankie relied on the circumstance, that the cases cited were cases of common process, whereas the process here was by attachment of privilege; but

The Court discharged the rule, and permitted the Plaintiff to amend without costs; intimating, at the same time, that wherever proceedings were amendable as of course, applications to set them aside for informalities would be fruitless.

Rule discharged.

MASTERMAN and Others *v.* MALIN.

April 23.

THE Plaintiffs having been nonsuited in this cause, and costs having been taxed for the Defendant,

Andrews Serjt. moved that the Plaintiffs might be at liberty to set them off against costs to be taxed for the Plaintiffs in a cause of *Doe d. Masterman and Others* v. *Malin*, in which the lessors of the Plaintiff had obtained a verdict, but which was now awaiting the consideration of this Court under a rule *nisi* for a new trial.

Though the Court will not set off probable costs against costs actually taxed, yet where the cause in which probable costs are expected is near decision, *semble*, they will suspend execution for the actual costs.

Bompas Serjt., who shewed cause, contended, that the authorities were all against such an application, and that no special reason, such as the insolvency of the opposite party, or the like, had been assigned for it; upon which,

The Court called on

Andrews, for an authority in support of his motion; which as he was unable to furnish, the rule was

Discharged.

Andrews

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MASTERMAN v. MALIN.

Andrews afterwards obtained a rule *nisi* to suspend execution for these costs till the Court should have come to a decision on the rule for a new trial in *Doe d. Masterman and Others* v. *Malin*; against which,

May 2. *Bompas* now shewed cause, and relied on the preceding decision, contending that the present application was, in effect, the same as the former; but

The Court, having now before them the Judge's report in *Doe d. Masterman and Others* v. *Malin*, said that they were ready to proceed at once with the hearing of that cause, and that a brief suspension of the applicant's right to costs did not fall within the reason of the decision on the former rule: they appeared disposed, therefore, to make this rule absolute, when

Bompas read an affidavit, from which it appeared that the costs in question had actually been levied under a *ca. sa.*, and with the assent and authority of *Masterman* himself: whereupon the rule was

Discharged.

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THWAITES *v.* SAINSBURY.

May 1,

ASSUMPSIT for goods sold and delivered.

Plea, *non-assumpsit.*

At the trial, proof having been given of the sale and delivery of the goods, the defence set up was, that the Plaintiff had subsequently received in full for his demand three bills of exchange accepted by *Leigh Hunt*, and *Clarke*; that he had taken these bills on his own risk, and had released the Defendant from all responsibility in respect of them. This was the only question in the cause. The bills, when due, were dishonoured, and were of no value whatever.

A verdict was found for the Plaintiff; which

Spankie Serjt. obtained a rule *nisi* to set aside, on the ground that it was contrary to the evidence; against which cause was shewn by

Jones Serjt., when the Court proposed to grant a new trial, but to limit the enquiry to the single question, whether the Plaintiff had agreed to take the bills on his own risk, expressly releasing the Defendant from any responsibility.

Spankie Serjt. objected, that the Court, in the exercise of its discretion as to granting a new trial, had seldom or never restricted a party in this way to a single point of enquiry; and he prayed to be allowed, as usual, to go to trial again generally, without restriction; but

The Court observing, that in causes where the defence was set out in pleading, the parties would, on a second

Where at the first trial of a cause in assumpsit, the question between the parties under the general issue is in evidence reduced to a single point, the Court, in granting a new trial on the ground that the verdict is against evidence, will confine the parties to the point investigated at the first trial.

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THWAITES v. SAINSBURY.

trial, be necessarily confined to the issues which were on the record at the first trial, and that it was expedient the same course should be pursued where a particular line of defence had been relied on under the general issue, imposed that condition on the Defendant, and made his rule for a new trial absolute on the following terms: — Payment of costs; bringing into court the money sought to be recovered; and limiting the enquiry on the new trial to the single point, whether the Plaintiff had agreed to take the bills on his own risk, expressly releasing the Defendant from any responsibility.

Rule absolute accordingly.

May 3.

COOK and Another, Assignees of BAKER, a Bankrupt, *v.* ROGERS.

1. Where a bankrupt made a payment to Defendant on the eve of bankruptcy, as *he* said, and as circumstances indicated, to benefit the Defendant, Held, that the assignee might recover the amount of the Defendant, notwithstanding the Defendant adduced evidence to shew that he had pressed for payment, and had threatened to arrest the bankrupt.

2. Notwithstanding such a threat, the motives and state of mind of the bankrupt at the time of payment may properly be left to the jury, upon a question whether the payment was voluntary or compulsory.

ASSUMPSIT for money had and received; and the question was, whether the Defendant had obtained it by fraudulent preference, or by a compulsory payment?

In *January* 1829, *Baker*, the bankrupt, purchased of the Defendant a shop and good-will at *Birmingham* for a considerable sum, 600*l.* of which, at the time of the demands hereinafter mentioned, remained to be paid for by a bill at six months, drawn by *Baker* and accepted by his father. The bill bore date the 26th of *March*, and was payable the 29th of *September*.

Baker having set up business with scarcely any capital of his own, was very shortly in the most desperate

circum-

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circumstances; and by the 18th of *September*, after numerous applications, several writs were out against him, upon one of which he had been arrested, and bailed. On the evening of that day he was to receive a sum of money for some property he had sold to meet immediate exigencies, when the Defendant, who had before threatened to arrest him if the 600*l.* bill were not paid when due, came, and, as the Defendant's witnesses deposed, again threatened to arrest both him and his father. The money not being paid, the Defendant came again on the morning of the 19th, and said he would be fooled no longer, when *Baker* paid him the 600*l.*, by a bill for 235*l.*, and 400*l.* in money, being part of the sum which he, *Baker*, had received the day before from the sale of his property. This payment, however, did not relieve *Baker* from his difficulty, or render it the more probable that he should continue his business. On the evening of the 19th he committed an act of bankruptcy, and on the 30th a commission was sued out against him.

Being called as a witness on the trial, he stated, that he paid the money to secure his father, and at the same time to benefit the Defendant; that he had no recollection of any threat; and if any had been used, it would have had no effect on him; that he was not exactly acquainted with the state of his accounts, and did not then contemplate bankruptcy, but, perhaps, a composition with his creditors; afterwards, however, on that day, he was advised to become bankrupt.

Tindal C. J. told the jury to consider, first, whether, at the time of the payment, *Baker* had in contemplation the breaking up of his affairs by bankruptcy; and, secondly, whether the payment was made voluntarily, or in consequence of any threat from the Defendant: and with a view to assist them in the determination of these questions, he directed them to consider what was

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passing in the bankrupt's mind at the time of the payment, and the motives by which he was probably actuated.

A verdict having been found for the Plaintiffs,

Adams Serjt. moved for a new trial, on the ground that the jury had been misdirected, and that the verdict was against evidence. What passed in the mind of the bankrupt, and the motives by which he was actuated, were, in this case, altogether immaterial: the Defendant having exercised due diligence, and having resorted even to threats to obtain his money, the payment by the bankrupt must be considered a compulsory, and, therefore, a valid payment. The negligent creditor would be placed in as good a situation as the diligent, and it would be fruitless to obtain payment by threat of process, or even by process itself, if, notwithstanding such manifest compulsion, the bankrupt could defeat the payment by a statement of his motives or intentions. Either the Plaintiff should have been nonsuited, or the jury should have been told that in point of law this was a payment by compulsion. In *Bayley* v. *Ballard* (*a*), where a trader, in contemplation of bankruptcy, and without solicitation, put three checks into the hands of his clerk, to be delivered to a creditor at the counting-house of the latter, but before they were delivered, the creditor called upon the trader, and demanded payment of his debt; it was held, that the intention to give a voluntary preference not being consummated, that was a valid payment. In *Hartshorne* v. *Slodden* (*b*), a debtor, at the instance of his creditor, gave goods out of his shop in part payment of a bond not then due, and shortly afterwards became bankrupt; it was held, that the mere circumstance of the bond not being due would not alone

(*a*) 1 *Campb.* 416. (*b*) 2 *B.* & *P.* 582.

vitiate

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vitiate the part-payment on the ground of fraudulent preference; and Lord *Alvanley* C. J. said, "It is not sufficient to avoid the delivery of goods by a trader that such delivery be made voluntarily on his part, and that an act of bankruptcy ensues; it must also appear that he had the act of bankruptcy in contemplation at the time of the delivery. Nor has it ever been held, that if a creditor press for payment of his debt, and thereby obtain goods, that the intention of the bankrupt shall be called in aid to set aside the transfer. If the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding." In *Crosby* v. *Crouch* (*a*) the act of delivering goods by a trader, to secure the defendant, who was under acceptances for him, payable at a future day, having been made in consequence of the urgency of the defendant, (evidenced by the proposal for giving such security originating with him), it was held immaterial to consider whether the trader had his bankruptcy in contemplation at the time, and that the transaction, being *bonâ fide* and not colourable, it was not impeached by the secrecy with which the delivery was made by the trader, in order to save his own credit in the view of the world; and Lord *Ellenborough* C. J. said, "Two things are necessary to concur in order to avoid the delivery of the goods; namely, the purpose of voluntary preference in respect to such delivery, and the contemplation of bankruptcy at the time when the goods were delivered. In considering whether the act in question were in this sense properly *voluntary*, it is material to see from which party the proposition of making the deposit originated, whether from the bankrupt or from the defendant. It certainly proceeded wholly from the

(*a*) 11 *East*, 256.

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defendant: he is stated to have *required* the act to be done. It is therefore, upon any fair interpretation of the words, not referable to any supposition of favour and preference exercised on the part of the bankrupt, but to urgency and importunity applied on the part of the person obtaining the deposit: and it has not been suggested that such requisition and urgency were colourable."

The doctrine of fraudulent preference is altogether the creature of courts of justice; no mention is made of it in the earlier statutes, and the Court will not strain the principle to the injury of a prudent and honest creditor.

A rule *nisi* having been granted,

Storks Serjt. shewed cause. Whether the payment were voluntary or compulsory is altogether a matter of fact to be ascertained by the jury; and the state of mind or apparent motives of the bankrupt are material circumstances to be enquired into, in order to assist the jury in coming to a determination on the point. The circumstance of his wishing to save his father, and of his paying the bill before it was due, were sufficient to prove it a voluntary payment. In *Harman* v. *Fisher* (*a*) a letter of the bankrupt's was produced, to shew the motives under which he had enclosed bills to a favoured creditor; and it being clear that the intention was to prefer that creditor, the transaction was held to be void. In *Thornton* v. *Hargreaves* (*b*), a trader being pressed by a creditor for payment or security, one or other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home and became a bankrupt; that was held, inasmuch as the act did not redeem the trader even from any present

(*a*) *Cowp.* 117. (*b*) 7 *East*, 544.

difficulty,

difficulty, which was the ordinary motive for such an act when really done under the pressure of a threat, evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy; and was therefore void as against the assignees of the bankrupt.

In *Hartshorne* v. *Slodden* there was no proof that the bankrupt had any intention to prefer the creditor; and in *Bayley* v. *Ballard* the execution of the intention was intercepted by prompt compulsion on the part of the defendant. In the present case the bill was paid before it was due, and the execution of the threat would not have placed the bankrupt in a worse situation than he was in before. In *Fidgeon* v. *Sharp* (*a*) it was decided, that whether a payment be made in contemplation of bankruptcy or not, is altogether a question for the jury.

Adams, and *Stephen* Serjt., in support of the rule, relied mainly on *Crosby* v. *Crouch*. In *Thornton* v. *Hargreaves*, the bankrupt transferred the whole of his stock; a transfer which was, of itself, an act of bankruptcy.

TINDAL C. J. I agree in one observation which has been made by the counsel for the Defendant; that the whole doctrine of fraudulent preference has arisen rather by the contrivance of courts of law than on the language of the bankrupt acts. In *Harman* v. *Fisher*, which followed *Temple* v. *Alderson* (*b*), Lord *Mansfield* held, that a transfer of bills made in contemplation of bankruptcy, and with a view to prefer a particular creditor, was void; because the trader "cannot take his estate out of that management which law puts it into," and "do an act of fraud contrary to the spirit of the bankrupt laws, and to the injury of his creditors." And Lord *Eldon* once

(*a*) 5 *Taunt.* 539. (*b*) 4 *Burr.* 2238.

 stated

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stated in the House of Lords, that this was a bold doctrine when first started, and in some degree a fraud on the act of parliament; because, if the act were insufficient in that respect, recourse should have been had to the legislature; but that after a course of decisions for fifty years, it was too late to alter the rule. The doctrine, however, has at length crept into the statute law; for in the 6 G. 4. c. 16. s. 82. we find certain *bonâ fide* payments protected, "such payments not being a fraudulent preference."

The question therefore is, whether the direction to the jury in this cause was correct, and the verdict proper? This is not a case of simple preference, nor the equally simple case of a payment obtained by threats, without any sinister intention on the part of the debtor. It is a mixed case, in which the debtor had an object in favouring the particular creditor, but in which the creditor also, before he knew of such a disposition on the part of the debtor, had urged and importuned him for payment. I am not able to perceive any mode of ascertaining whether the payment and the delivery of the bill in this case were such as the law protects or such as the law avoids, but by putting it to the jury to say, whether the payment were made in contemplation of bankruptcy, and under fear of compulsion, or voluntarily. On those two points I left it to the jury, and they were at liberty to find whether the payment was made out of favour to the Defendant, or under the influence of his threats. It has been argued by the counsel for the Defendant, that wherever threat or importunity is resorted to, there cannot be voluntary payment. But that proposition is too constrained, and it must be left to the jury to say, whether the threat had any operation or not. In *Thornton* v. *Hargreaves*, the trader being pressed by a creditor for payment or security, one or other

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other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home, and became a bankrupt: inasmuch as the act did not redeem the trader, even from any present difficulty, the Court held that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy. If, where a threat has been employed, no other circumstance is to be enquired into, how came Lord *Ellenborough* in that case, to look into all the accompanying facts on the motion for a new trial; and to say — "Taking the conversation reported between the Defendants and the bankrupt to be a threat of process, if they did not receive payment or security for their demand, I do not see how such a threat could put the bankrupt in a worse situation than the actual transfer of the goods did; for that left him without any property, and he was immediately obliged to break up his business and leave his home. This would rather shew that he did not make the transfer by dint of the threat; for he did not redeem himself even from any present difficulty by doing the act; which is the motive for such an act when really done under the pressure of a threat. And if he got nothing by avoiding the threat, I should rather say that it was a voluntary act, and preference on his part as to the particular creditor, although it is a very suspicious case, and fit to be enquired into and submitted to another jury." That is conclusive to shew the Court did not consider the threat a sufficient reason for shutting out the consideration of other circumstances. I was justified, therefore, in leaving this case open to the jury on both points, viz. whether the payment were made in contemplation of bankruptcy, and under fear of compulsion, or voluntarily. They have found that it was made voluntarily,

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tarily, and with a view to favour the particular creditor, and I see no reason for disturbing the verdict.

PARK J. This rule has been obtained on the ground that the jury were misdirected by the Judge, and that the verdict is against the evidence. I cannot perceive any objection in law to the mode in which this was left to the jury. If the question which has been left to them be substantially correct, the Court will not grant a new trial because the language of the Judge has been a little redundant, or may be open to mere objections of criticism. The question is, Was it proper to leave to the jury the frame of mind and probable motive of the bankrupt in making the payment in question? That has always been done since the case of *Harman* v. *Fisher*; and even in *Crosby* v. *Crouch* it was the wish of Lord *Ellenborough* to go to the jury, but the counsel elected to be nonsuited. *Bayley* v. *Ballard* I can hardly consider law; and Lord *Ellenborough* in that case went a length he had never gone before; for the bankrupt having borrowed 1400*l.* of the Defendant on the security, among other things, of a bill on a third person for 1200*l.*, repaid 1139*l.* by checks, upon the Defendant's merely demanding his money and giving up the bill for 1200*l.*; and though it was manifest the bankrupt had intended to send the checks, even without a demand, Lord *Ellenborough* held it not a voluntary payment. It is not necessary, however, here to impeach that decision; for the present case is compounded of a variety of circumstances, which sufficiently justify the course which has been taken. I do not say that because the debtor desired to benefit his father, the payment to the Defendant was necessarily to be deemed a voluntary payment; but it was a material fact to leave to the consideration of the jury. It is admitted that the debtor had

had bankruptcy in contemplation. The jury have drawn their conclusion from the whole combination of circumstances. I am inclined to think I should have found the same way; but at all events, they are not so clearly wrong as to induce us to disturb the verdict.

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GASELEE J. The points to be determined were distinctly left by the Chief Justice to the jury, namely, whether the payment in question were made under the pressure of a threat or voluntarily. I find no fault with that mode of summing up the case, but I think the verdict wrong, and against the whole weight of evidence, particularly with reference to the rule laid down in some of the cases as to the criteria of voluntary payment. It is much to be desired that a uniform and consistent rule were established on that point; but the cases on the subject are so conflicting, that it seems impossible to reconcile them. If *Bayley* v. *Ballard* be law, it puts an end to this case; for a mere demand by the creditor was held sufficient to prevent the payment from being esteemed voluntary, although the bankrupt had a clear intention to pay even without any demand. In the present case there has been not only a demand but a threat: but in *Thornton* v. *Hargreaves*, although there was a threat, yet the Court held that the other accompanying circumstances were to be enquired into, which Lord *Ellenborough* said would rather shew that the bankrupt "did not make the transfer by dint of the threat, for he did not redeem himself from any present difficulty by doing the act, which is the motive for such an act when really done under the pressure of a threat." It is difficult, however, to determine what is meant by an act done under pressure of a threat; for in *Hartshorne* v. *Slodden* Lord *Alvanley* says, "It is not sufficient to avoid the delivery of goods by a trader, that such delivery

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delivery be made voluntarily on his part, and that an act of bankruptcy ensues; it must also appear that he had the act of bankruptcy in contemplation at the time of the delivery. Nor has it ever been held, that, if a creditor press for payment of his debt, and thereby obtain goods, the intention of the bankrupt shall be called in aid to set aside the transfer. If the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding." Difficulties have also been raised as to the effect of the debt in question being not actually due. In *Hartshorne* v. *Slodden*, that circumstance was holden to be immaterial; but in *Singleton* v. *Butler* (*a*), where payment of a note was defeated on the ground of fraudulent preference, Lord *Eldon* distinguished the case from that of *Smith* v. *Payne*, by observing, that, in the latter, "the security was taken for a debt actually due."

The present verdict appears to me to be altogether against the weight of evidence, and the decision likely to operate with considerable hardship on creditors.

ALDERSON J. I concur with the Chief Justice and my brother *Park*. In all these cases there are two questions: one, whether the payment has been made in contemplation of bankruptcy; the other, whether it has been made voluntarily or not. These are questions of fact which must be left to the jury upon the circumstances of each case, and this consideration will, I think, reconcile all the decisions. The apparent contradiction arises from treating observations, which have really been made with reference to the peculiar facts of the cause under

(*a*) In a note to *Hartshorne* v. *Slodden*, 2 *B.* & *P.* 583.

discussion,

discussion, as general principles of law and of universal application. Thus, in *Hartshorne* v. *Slodden*, Lord *Alvanley* said that the intention of the bankrupt should not be called in aid to set aside a transfer, but in a case, as he says, where a creditor presses for payment of his debt, and *thereby* obtains goods. "*If* the goods be delivered *through the urgency of the demand*, whatever may have been in the contemplation of the bankrupt will not vitiate the proceeding." So, in *Crosby* v. *Crouch*, Lord *Ellenborough* considered it immaterial to enquire into the bankrupt's intentions; but that was because the other facts in that case established that the delivery of the goods was "not referable to any supposition of favour and preference, but to urgency and importunity on the part of the person obtaining the deposit." On the other hand, in *Thornton* v. *Hargreaves*, the motives of the bankrupt were, by the same learned Judge, deemed material, because the threat of the creditor, if carried into effect, "could not put the bankrupt in a worse situation than the actual transfer of the goods."—"He did not relieve himself even from any present difficulty by doing the act."

It seems to me, therefore, that the motives and intentions of the bankrupt may be material or immaterial, or, to speak accurately, may be more or less material according to his situation, to the nature of the threat, and the degree and period of urgency by the creditor.

In like manner we find, that in cases where the payment has been made before the debt was due, that circumstance has sometimes been relied on as an indication that the payment is voluntary, and at other times has been said to be immaterial; but neither in the one case nor in the other do these facts of themselves furnish any certain criteria; they are only ingredients in the whole question upon which the jury are to come

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come to a determination. Threats on the part of the creditor are a strong circumstance to shew that the payment ensuing is not voluntary: but if, as here, the party be not placed in a better situation by yielding to the threats, or if he disclose such a reason for preference that the threats could obviously have produced no perceptible effect on his mind, those are circumstances which afford a strong inference the other way. It has been urged, indeed, that the motive of the bankrupt in this case was altogether immaterial, and if, as in *Hartshorne* v. *Slodden*, the payment had been clearly made in consequence of the threat, it might have been immaterial to examine whether the bankrupt were also actuated by any other motive; as, for instance, if the money had been paid in order to get rid of an actual and *bonâ fide* arrest; but when, as here, it is not clear what effect, if any, the threat of the creditor has produced, it was most material to ascertain what were the motives by which the bankrupt was actuated. Here the whole was left to the jury, and there were facts which might weigh on either side. Whether we should have come to the same conclusion as the jury is not the question now, but whether we can see our way clearly to the conclusion that the jury are wrong. As I am unable to do this, I think the verdict ought not to be disturbed, and the rule obtained on the part of the Defendant must be

Discharged.

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REGNART *v.* PORTER and Another.

May 3.

REPLEVIN. Avowry for four years' rent due at Midsummer 1830; and the question was, Whether a demise at a rent certain could be collected from the following circumstances.

In *June* 1826 the Plaintiff and Defendant entered into the following agreement: — "*Thomas Porter* agrees to let on lease, and *Phillip Regnart* agrees to take a lease and execute a counterpart of the house and premises situated and being at the north-east corner of *Poole Street* and *Bridport Place*, *Hoxton*, in the parish of *St. Leonard*, *Shoreditch*, for a term of sixty years from Midsummer next ensuing, at the rent of 25*l.* payable quarterly, clear of all deductions and abatements whatsoever; and to insure the said premises from fire, in the joint names of the said *Thomas Porter* and the superior landlord, and the said *Phillip Regnart*; such lease to contain the same covenants as the other leases granted by *Henry Charles Sturt* Esq., in the same estate. And the said *Thomas Porter* agrees to complete the said house and premises fit for habitation and occupation, with all proper locks, &c. forthwith. And the said *Thomas Porter* agrees to allow the said *Phillip Regnart* 15*l.* towards erecting and completing an oven for the uses of the shop as a baker's, and to fix a bresummer in the back front window, in the basement. And the said *Phillip Regnart* agrees to erect and build a good and substantial oven, with all iron-work, labour, and materials to complete the same fit for use forthwith. The said rent to commence at *Michaelmas-day* next ensuing. And it is further agreed that each party doth

A tenant entered under an agreement, containing stipulations for a lease at 25*l.* a year, and an engagement by the landlord to complete certain erections. The erections were never completed, and the tenant never paid any rent; but being called on after some years' occupation, said he was ready to pay what was due, provided the erections were completed, and an allowance made him for the expense of some repairs:

Held, that a demise at a rent certain could not be implied so as to entitle the landlord to distrain.

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doth bind himself, his executors, administrators, and assigns to perform and execute the aforesaid covenants and agreements."

The Plaintiff entered at *Christmas* 1826, and erected the oven pursuant to his engagement; but the Defendant never completed the premises, or fixed the bresummer in the back front window.

The Plaintiff, however, continued to occupy the premises, but never paid any rent. When, at the expiration of nearly four years, he was called on for that purpose, he said he had the money ready, and was prepared to pay what was due, but insisted on the previous performance of the stipulations in the agreement, and on the allowance of certain sums he had been compelled to lay out on the premises; so that no specific sum was ever agreed on as the amount due from the Plaintiff.

Under these circumstances, the Chief Justice, before whom the cause was tried, thought there was no evidence of a demise at a rent certain; and a verdict was taken for the Plaintiff, with leave for the Defendant to move to set it aside, and enter a nonsuit instead.

Russell Serjt. moved accordingly. It may be admitted that the agreement of *June* 1824, containing prospective stipulations for money to be laid out on the premises, and for a future lease, cannot operate as a demise *in præsenti*. *Dunk* v. *Hunter*. (*a*) But where a party enters under such an agreement, and pays rent, or allows it in account, a new demise at a rent certain is implied from the occupation, and payment, or allowance in account, of the rent demanded. *Knight* v. *Benett* (*b*), *Cox* v. *Bent*. (*c*) In *Hamerton* v. *Stead* (*d*), *Littledale* J. said, "Where parties enter under a mere agreement

(*a*) 5 *B.* & *A.* 322.
(*b*) 3 *Bingh.* 361.
(*c*) 5 *Bingh.* 185.
(*d*) 3 *B.* & *C.* 483

for

for a future lease, they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year."

A rule *nisi* having been granted,

Bompas Serjt. shewed cause. In *Knight* v. *Benett* rent was actually paid; and in *Cox* v. *Bent* the tenant himself named the exact amount of the rent in accounting with the landlord's clerk; but here, although the tenant has expressed his willingness to pay when it should have been ascertained what rent was due, no sum has ever been agreed on as the rent due.

Russell. The Court will not refine away the landlord's right to distrain by resorting to so subtle a distinction. But it may be contended, that the sum due from the Plaintiff for rent *has* been agreed on in this case: *id certum est quod certum fieri potest:* the Plaintiff agreed to pay what was due, after the allowance of a certain sum expended for repairs; he agreed, therefore, to pay the rent, minus that sum; just as the tenant in *Cox* v. *Bent* agreed to pay 225*l.* upon observing that that the demand of 250*l.* was an overcharge of 25*l.* That case is exactly in point.

TINDAL C. J. The question is, Whether there is evidence that *Regnart* held as a tenant to *Porter* at a rent certain; for unless he was tenant, and at a rent certain, the avowant had no right to distrain. It is admitted, that if there was any tenancy at all, it was not under the agreement in evidence, for that contains no words of present demise; and it may also be conceded, that if a party enters and pays, or promises to pay a rent certain, or settles it in account, a new agreement may be presumed under which the landlord may have the right to distrain. The only question in this case is,

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Whether the party did pay or promise to pay a rent certain, or settle it in account.

In such a case the labouring oar of proof is cast on the avowant. Has he produced any evidence here, equivalent to the circumstance proved in *Cox* v. *Bent?* It is stipulated here, that the landlord shall complete the house and premises fit for habitation, with locks, &c. forthwith, and fix a bresummer in the basement; and by another clause, that an oven shall be erected by the tenant, and allowance be made for it by the landlord to the extent of 15*l.* There is no evidence that the erection of the bresummer ever took place; and when we enquire whether the party agreed to hold at the rent reserved in the lease, it is surely material to see whether he had full enjoyment. Then, after nearly four years had elapsed, the party says he has the money and is ready to pay what is due. If nothing else had been said, there might perhaps be some ground for implying a promise to pay the rent in question; but the expressions never fall from him unaccompanied with an allusion to the terms of the lease; all which shews an agreement to pay, limited and conditional, and not absolute and unqualified. If an action had been brought for use and occupation, who is to say that a jury might not have given, under these circumstances, a less sum then that reserved in the lease. Before, therefore, a landlord takes into his hand the speedy remedy of distress, he must see that the amount of rent to be demanded has been settled with precision.

PARK and GASELEE Js. concurred.

ALDERSON J. Unless there be a demise at a rent certain a landlord cannot distrain. The avowant, therefore, must fail in this case, as he has not proved even an admission by the Plaintiff as to the amount of rent. In

Cox

Cox v. *Bent* the precise amount of rent due was admitted by the tenant. Here no specific sum has been mentioned.

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Rule discharged.

ADDIS Demandant, NORRIS Tenant, POWER Vouchee.

May 5.

JONES Serjt. moved to amend a recovery, and the warrant of attorney, by altering the vouchee's name from *Patrick Power* to *Patricio Nicholas Placedo Power*. The deed to lead the uses was executed in the name of *Patrick Power*, by which name the vouchee had always been called and known; but he now deposed that by a certificate of baptism from *Teneriffe*, the place of his birth, he had recently discovered that he had been baptized by the name of *Patricio Nicholas Placedo Power*. *Jones* referred to *O'Brien vouchee* (*a*), and *White demandant, Herne vouchee* (*b*), as authorities in support of his motion.

Where the warrant of attorney and deed to lead the uses were executed in a name by which the vouchee was commonly known, the Court refused to amend the recovery by substituting a different name by which, as he afterwards discovered, he had been baptized.

TINDAL C. J. You require us to alter the deed, which was not done in *White demandant, Herne vouchee*. If the vouchee be, as it is deposed, known by one name as well as the other, the amendment is unnecessary, and we are not to make it to humour the whims of conveyancers.

GASELEE J. The case of *O'Brien vouchee*, has been overruled by the practice of the last ten years.

Jones took nothing.

(*a*) 4 *Taunt.* 196. (*b*) 8 *Taunt.* 27.

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May 6.

COSTER *v.* COWLING.

A 3*l.* stamp is not sufficient on a lease reserving 370*l.* for house and land; and by a distinct reservation, 50*l.* for furniture and fixtures.

COVENANT on a lease of house and land. Breach, non-repair. 370*l.* a year was reserved for the house and land, and, by a separate reservation, 50*l.* a year for furniture and fixtures. The deed was stamped with a 3*l.* stamp. It was objected that the stamp ought to have been 4*l.*; and the verdict was taken for the Plaintiff, subject to a motion for a nonsuit on this objection.

A rule *nisi* having been granted,

Taddy and *Andrews* Serjts. shewed cause. They contended that if the rent for the furniture and fixtures had been reserved at a separate time, or by a separate instrument, a higher amount of stamp on the two instruments or reservations might have been requisite. But here the proper stamp was affixed according to the reservation on house and land; and the rent on furniture and fixtures being merely accessory, no further stamp was required. This was in substance a lease of land, and the language of the schedule 55 *G.* 3. *c.* 184. is, "Lease or tack of any lands, hereditaments, or heritable subjects, at a yearly rent, without any sum of money by way of fine, premium, or grassum, paid for the same," above 200*l.* and under 400*l.*, 3*l.*

TINDAL C. J. The Plaintiff is in this dilemma: the 50*l.* reserved for the furniture and fixtures is either accessory or distinct. If it be accessory it should have been calculated with the principal sum, and then the stamp for the deed would have been 4*l.* If it be distinct it falls within the description "lease of any other kind

kind not otherwise charged, 1*l.* 15*s.*," and should have had a separate stamp. 1831. COSTER v. COWLING.

PARK and GASELEE Js. concurred.

ALDERSON J. The stamp is not sufficient for the two reservations, even if they be taken conjointly. In *Boase* v. *Jackson* (*a*), upon a demise to defendant of a slate pit at *B.* and stone quarries at *C.*, possession to be taken of the two at different and distant times, the Court being of opinion that no fraud was intended, held, that the lease was properly stamped with one *ad valorem* stamp under 55 *G.* 3. *c.* 184., but that was because it appeared that possession could not be given of the stone quarries at the same time with the slate pit, nor till the time mentioned in the lease.

Rule absolute.

(*a*) 3 *B.* & *B.* 185.

WRIGHT and Another *v.* WRIGHT. *April* 28.

THIS was a feigned issue to try the question whether or not one *Thomas Wright*, deceased, did by a certain paper writing purporting to be his last will and testament devise his freehold estates. The jury found a special verdict, setting forth the paper writing in question, the whole of which, excepting the signatures of two of the witnesses, and the mark of the third, they

A will of lands, subscribed by three witnesses in the presence and at the request of the testator, is sufficiently attested, although none of the witnesses saw the testator's signature, and only one of them knew what the paper was.

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found to be in the testator's handwriting. They further found that the said paper writing (excepting the words "*Elizabeth Flaxman*," "her mark," the two former of which words were written on one side of that witness's mark, and the two latter on the other) was wholly written by the testator, and his signature opposite the seal was made, before the said paper writing was signed by the witnesses *Judith Evetts*, *Henry Walker*, and *Elizabeth Flaxman*, or either of them: that about six years before his death, the testator requested the said *Judith Evetts* to sign her name to the said paper writing in his presence, which she accordingly did; and that at the time of her so signing the same he informed her that the said paper writing was his will: that after she had so signed, but at another time, and when she was not present, the testator requested the said *Henry Walker* to sign his name, and the said *Elizabeth Flaxman* to make her mark, which they accordingly did, in his presence and in the presence of each other; and that after the said *Elizabeth Flaxman* had so made her mark the testator wrote against the mark the words "*Elizabeth Flaxman*," "her mark," in manner aforesaid: that the last two witnesses were not at any time informed that the said paper writing was the testator's will, nor did any of the witnesses at the time of attesting the said paper writing see the testator's signature opposite the seal thereof. It was further found that at the time of his writing and signing the said paper writing, and at the times of the several attestations thereto, the testator was of sound and disposing mind.

It appeared that immediately above the names of the witnesses were written these words: "Signed, sealed, published, and declared by the said testator *Thomas Wright*, as and for his last will and testament, in the presence of us who at his request and in his presence, and

and in the presence of each other, have hereunto subscribed our names as witnesses hereto."

Taddy Serjt. was to have argued in support of the will, but the Court called upon

Storks Serjt. to distinguish the present case from the case of *White* v. *The Trustees of the British Museum* (*a*), and *Storks* admitting that the cases were not distinguishable,

The Court said that they must abide by their decision in the latter case, and pronounced in favour of the will.

Judgment for Plaintiffs. (*b*)

(*a*) 6 *Bingh.* 310.

(*b*) WRIGHT and Another v. WRIGHT.

(Before LITTLEDALE J., *Norfolk* Summer Assizes, *August* 4 1830.)

Where on the trial of an issue out of chancery, it is ordered that a third party should be at liberty to attend the trial, the counsel for such party will not be permitted to call witnesses nor to address the jury.

In this case the Vice-Chancellor had directed an issue *devisavit vel non*; and had ordered that *Francis Wright*, the executor and trustee for sale under the will, "should be at liberty to attend the trial of such issue." The Plaintiffs were legatees under the will, and the Defendant heir at law.

After the Plaintiffs had closed their case, and the Defendant's counsel (who called no witnesses,) had addressed the jury, *Prendergast*, who appeared for *Francis Wright*, contended that he had a right to address the jury. He submitted that he had the same privileges under this issue, as he would have had if appearing for the same client in the court of equity; and there he would be permitted to address the Court, as he now proposed to address the jury. He also argued, that unless he was allowed to address the jury, the permission to attend would be unmeaning. He had, or might have, different instructions, and a different case to submit from those of both the other parties; and unless he were allowed to present such case to the jury his attendance would be useless.

Storks Serjt. for the Defendant, contended, that none but the parties on the record were entitled to address the jury; and he cited a case tried before *Best* C. J. at *Bedford*, in which an issue had been directed, touching the sanity of Sir *Gregory Page Turner*, and leave given to a third party in the equity suit to

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to attend the trial at law. The counsel for that party having insisted on his right to address the jury, it was ruled by *Best* C. J. that he might cross-examine the witnesses, and submit points of law to the Court, but could not address the jury.

LITTLEDALE J. I have consulted my brother *Parke*, who entertains a doubt; but I am of opinion, upon principle, that *Francis Wright* cannot be allowed to address the jury, for he is not a party to the record. Nor do the terms of this order make any difference; for if it had been the intention of the court of equity to allow him this privilege, he would have been made a party to the issue. But as he is only permitted to attend the trial, it is plain that the Court which directed the issue intended to make a distinction between him and the other parties. The course proposed to be adopted would be attended with great inconvenience. If this party were allowed to address the jury, why should he not call witnesses? And if so, a wholly different case might be presented to the Court from that in contest between the Plaintiff and Defendant, and a different issue raised from that intended to be raised by the order. I think that this party can only be allowed to cross-examine the witnesses, and to suggest points of law; and that he can neither call witnesses himself nor address the jury. This I decide upon principle, and I am fortified in my opinion by the decision of Lord Chief Justice *Best*, which has been cited at the bar.

Andrews and *Austin* for Plaintiffs.

Storks Serjt. and *Kelly* for Defendant.

Prendergast for *Francis Wright*.

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DELEGAL and Others *v.* NAYLOR.

The Defendants being under agreement to pay the Plaintiffs the value of certain *billettes* issued to the Plaintiffs by the *Peruvian* government on a remonstrance by the *British* government, as a compensation for injury done to the Plaintiffs, Held, that the prothonotary was to estimate the value as the value of a bill of exchange for the same number of dollars on a house of respectability at *Lima*, although the *billettes* were at a great discount.

THE government of *Peru* having improperly detained a ship of the Plaintiffs, were induced, by the interposition of the *British* government, to make the Plaintiffs a compensation, which they paid in paper money of the *Peruvian* government called *billettes*, purporting to be of the value of 16,011 dollars. The Defendant having claimed

claimed to retain these *billettes* under a title which he could not sustain, the Plaintiffs sued him in trover, and the matter being referred to arbitration, an award was given in favour of the Plaintiffs.

By a rule of this Court, it was then ordered that execution should only issue for the value specified in the *billettes*, to be estimated by the prothonotary at the rate at which they were current at the time of the award.

It was afterwards arranged that the Defendant should, by a certain day, now past, deliver up the identical *billettes* in respect of which he had been sued, or pay the value found by the prothonotary.

The prothonotary found the value to be 3460*l.* 12*s.* 6*d.* taking the dollar at 4*s.* 1*d.*, its value in this country, and the *billettes*, as worth the number of dollars they represented.

The Defendant having been unable to procure and deliver up the identical *billettes*,

Jones Serjt., upon affidavits that the *billettes* were at a discount of from 60 to 70 per cent. at *Lima*, and were worth there little more than a third of the sum they represented, and that the Plaintiffs had at one time ordered the Defendant to get rid of them at 60 per cent. discount, obtained a rule *nisi* calling on the Plaintiffs to shew cause why the prothonotary should not revalue the *billettes*.

Taddy and *Wilde* Serjts. shewed cause upon affidavits, which stated that the identical *billettes* were worth to the Plaintiffs the full value they represented, though they might be of less value in the hands of others, and in the *English* market were of no value at all. The *Peruvian* government having issued them to the Plaintiffs by way of compensation, upon a remonstrance by the *British* government, would not venture to allow less than the full

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full nominal value if they should be presented by the Plaintiffs themselves in *Lima*. The prothonotary, therefore, in estimating the value to the Plaintiffs, could only enquire what was the value of the number of dollars the *billettes* represented.

Jones (*Bompas* Serjt. was with him), *contrà*. These *billettes* must be valued, like any others, at the amount at which they are current; that is, at 60 or 70 per cent. discount. For aught that appears to the contrary, the *Peruvian* government may have issued enough of them to the Plaintiffs to pay them their whole claim at that rate.

At all events the prothonotary ought to have taken into account the expense of transmitting to or from *Lima* the sum to be paid by the Defendant, which, according to the affidavits, would reduce the value of the dollar from 4*s*. 1*d*. to 3*s*. 4*d*.

The Court having taken time to look into the affidavits, ordered that the value of the *billettes* should be taken as 16011 dollars; and as to the dollars, that the Plaintiffs should be in the same situation as if they had in their hands a bill of exchange for 16011 dollars on a house of unquestionable solidity at *Lima*. The amount to be obtained for such a bill would depend, not on the value of the dollars alone, but on the rate of exchange resulting from the expense and risk of transfer between *London* and *Lima*; and the prothonotary was to ascertain what such a bill was worth in *London*. (*a*)

(*a*) The *billettes* in question having been insured by the Defendant from *Lima* to *England*, and their loss by the perils of the seas having been assigned as the reason why they were not restored to the Plaintiffs,

Spankie Serjt. claimed to be heard in support of the foregoing rule, on behalf of the underwriters; but the Court declined to hear him, on the ground that the underwriters were strangers to the suit between the Plaintiffs and Defendant.

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DUVERGIER *v.* FELLOWS.

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The plaintiff below having given bail in error in an action on a bond, the Court ordered the recognizance to be cancelled, even after judgment affirmed in the court below, and a new writ of error brought to the House of Lords, and though the Plaintiff was a foreigner and insolvent.

TINDAL C. J. This was a rule calling upon the Defendant to shew cause why the recognizance of bail in error in this cause should not be cancelled. The facts of the case are these: —

In the year 1828 an action was brought in this court by the Plaintiff in error against the Defendant in error on a bond; in which action the Defendant pleaded several pleas, on some of which issues were joined, and others were demurred to.

The demurrers having been argued, judgment was given for the Defendant in *Michaelmas* term 1828.

A writ of error having been brought on the judgment, the recognizance of bail, now sought to be cancelled, was entered into, conditioned to prosecute the writ of error with effect.

That writ of error was argued in the Court of King's Bench in *Easter* term last, when the judgment of this Court was affirmed.

A writ of error upon that judgment of affirmance was afterwards brought, which is now depending in the House of Lords. Upon the bringing of that writ of error, a recognizance of bail having been entered into similar to that entered into in this Court, an application to cancel that recognizance was made to the Court of King's Bench, when a rule *nisi* was granted, which, in *Michaelmas* term last was made absolute on payment of costs, on the authority of the case of *Freeman* v. *Gardner* (*a*), in which it was held that the statute of 3 *Jac.* 1. *c.* 8., requiring the recognizance to be in double the

(*a*) 1 *D.* & *R.* 184.

sum

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sum recovered, extended only to cases in which the writ of error was brought by the Defendant in the court below.

The present application was afterwards made to this Court, and on shewing cause against it, the authority of the case in *Dowling* and *Ryland* was not disputed, nor the propriety of the decision of the Court of King's Bench between these parties; but it was insisted that the present application came too late, the parties having laid by until after the judgment was affirmed, and a new writ of error brought.

We think, however, this circumstance makes no difference, inasmuch as there being no authority to compel the entering into such recognizance, it seems to us it cannot possibly be enforced.

Another objection made to the application is, that the Plaintiff is insolvent and a foreigner, resident out of the jurisdiction of the Court; and that the action was brought, not for his benefit, but of a creditor whom he had permitted to use his name; all which appears by affidavit; and that the Court would, under the circumstances, have compelled the giving security for costs.

To this we answer, that a special application for that purpose should have been made pending the suit, and that this Court cannot, at this period of the cause, take any notice of those circumstances. We are therefore of opinion the rule should be made absolute. On the part of the bail it is contended, that under the circumstances stated in the affidavits, it should be made absolute without costs; but we see no reason to make any distinction between that case and the rules pronounced by the Court of King's Bench: it must, therefore, be absolute upon payment of costs.

Rule absolute.

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THE declaration alleged, that the Defendant with force and arms, &c. stopped a certain waggon and divers, to wit, four horses harnessed thereto, of and belonging to the Plaintiff, the said waggon being then and there loaded with divers, to wit, 100 sheaves of wheat, &c., and then and there unhooked, unharnessed, and unfastened the said horses of the Plaintiff from the loaded waggon of the Plaintiff, and then and there harnessed and fastened other horses to the said loaded waggon; and then and there seized, took, and drove the same with the said wheat, &c. laden thereon as aforesaid away, and converted and disposed of the said waggon, wheat, &c. so laden thereon as aforesaid, to the Defendant's own use. To which the Defendant pleaded, secondly,

If the lease contain no stipulations as to the mode of *quitting*, the off-going tenant is entitled to his 'way-going crop according to the custom of the country, even though the terms of *holding* may be inconsistent with such a custom.

That before and at the time when, &c. the Defendant was lawfully possessed of a certain close or piece or parcel of land called the *Rack Field*, situate and being at, &c.; and because the said waggon and horses at the said time when, &c. were wrongfully in and upon the said close or piece or parcel of land encumbering the same, and doing damage there to the Defendant, he at the said time when, &c. stopped the said waggon and horses in the said close or piece or parcel of land so encumbering the same as aforesaid, and then and there harnessed and fastened other horses to the said waggon, and seized, took, and drove the said waggon away to a small and convenient distance, to wit, in, &c., and there left the same for the use of the Plaintiff, doing no unnecessary damage to the same on that occasion.

Repli-

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Replication, that long before the said time when, &c. to wit, on the 3d day of *June* 1825, at, &c. the Plaintiff had become and was tenant to one *George Naylor* of a certain messuage, buildings, farm, and land, situate, &c. comprising, amongst other closes, pieces, or parcels of land, the said close, piece, or parcel of land in the second plea mentioned, and in which, &c. called the *Rack Field*, that is to say, as tenant thereof from year to year for so long time as the Plaintiff and the said *George Naylor* or other the person or persons for the time being entitled to the reversion of and in the said messuages, buildings, farm, and land should respectively please; and that the tenancy of the Plaintiff of and in the said farm and land (except a certain close, parcel thereof, used as a boozy pasture,) commenced on and from the 25th of *March* 1825; and the tenancy of the Plaintiff of and in the said close, parcel of the said farm, used as a boozy pasture, and of and in the said messuage and buildings, commenced on and from the 1st day of *May* 1825, to wit, at, &c.: that he continued to occupy the said farm and land comprising the said close in which, &c. called the *Rack Field*, and the said other closes, pieces, or parcels of land, as such tenant thereof as aforesaid, until and upon *Lady-day* in the year 1830, when his said tenancy of and in all the said closes, pieces, and parcels of land (except the said close used as a boozy pasture) ended and determined; and that he continued to occupy the said messuage, buildings, and close used as a boozy pasture, as such tenant thereof as aforesaid, until and upon the 1st of *May* in that year, when his said tenancy of and in the said messuage, buildings, and close used as a boozy pasture, also expired, to wit, at, &c. And the Defendant thereupon, at the respective times last aforesaid, became and was the next succeeding and incoming tenant

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tenant and occupier of the said messuage, buildings, and farm and lands, to wit, at, &c. That long before either of the said several and respective times hereinbefore mentioned, and during all the time he the Plaintiff continued to occupy the said messuages, buildings, farm, and land, there hath been and still is, and from time whereof the memory of man is not to the contrary there hath been, a certain ancient and laudable custom used and approved of within the said parish; that is to say, that every tenant and occupier of any lands within the same parish, holding from year to year, such year ending on the 25th of *March*, or on the 1st of *May*, and who has sown any of his land with wheat on a fallow at the wheat seedness next before the expiration of his tenancy, and has afterwards reaped the wheat growing on such land, as and for a part of his 'way-going crop, has been used and accustomed to, and of right ought to have, take, and enjoy to his own use, two third parts of such wheat, and to leave the other third for the incoming tenant; and that every such tenant who has sown any of his land with wheat after a crop of turnips at the wheat seedness next before the expiration of his tenancy, has been used and accustomed, and of right ought to have, take, and enjoy to his own use, and to reap, cut, and carry away, when ripe, and fit to be reaped and carried away, his 'way-going crop; that is to say, one half of the wheat so sown after a crop of turnips as aforesaid, and to leave the other remaining half part thereof for the use of the incoming tenant: that at the wheat seedness next before the expiration of his said tenancy of and in the said messuage, buildings, and land, that is to say, on the 15th *November* 1829, and in the season next after, the said field called *Rack Field* had been sown with turnips as aforesaid, and he, the Plaintiff, sowed with wheat the said field called *Rack Field*,

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Field, after such crop of turnips as aforesaid; and that afterwards, and after the expiration of the tenancy of the Plaintiff, and whilst the said messuage, buildings, farm, and land were in the tenancy and occupation of the Defendant, as such succeeding and incoming tenant as aforesaid, to wit, on, &c., the Plaintiff cut down and reaped the said wheat growing on the field called the *Rack Field*, and so sown by him as aforesaid; and afterwards, to wit, on, &c., at, &c., by and with the approbation, consent, and concurrence of the Defendant, did set apart one half part of the said wheat so cut down and reaped as aforesaid, and did leave the same for the use of the Defendant; and by and with the like approbation, consent, and concurrence of the Defendant, did reserve and keep the other and remaining half part for the use of himself, the Plaintiff: that afterwards, to wit, on, &c., at &c., he, the Plaintiff, did go to and enter the said field called the *Rack Field* with the said waggon and horses, for the purpose of housing and carrying away the said half part of the said wheat so reserved and kept by and so belonging to him as aforesaid, and did then and there load the said waggon with a certain quantity of the said last-mentioned wheat, to wit, the said quantity in the declaration mentioned, and was then and there about to drive away the said waggon and horses, with the said wheat thereon as aforesaid, from and out of the said field called the *Rack Field*, unto a convenient place for the preserving and keeping the same last-mentioned wheat, until the Defendant, of his own wrong, stopped the said waggon and horses, and harnessed and fastened other horses to the said waggon, and seized, took, and drove the said waggon away, and converted and disposed of the said waggon to his the Defendant's own use, in manner and form as the Plaintiff had above complained against him.

Rejoinder,

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Rejoinder, that although the Plaintiff had become and was tenant of the said messuage, buildings, farm, and lands in the replication to the second plea mentioned, and continued to occupy the said farm, land, and premises as such tenant thereof as aforesaid, until and upon the respective times in the said replication in that behalf mentioned, in manner and form as the Plaintiff had therein in that behalf above alleged; for rejoinder nevertheless to the said replication the Defendant said, that the Plaintiff during all the time aforesaid held and occupied the said farm, land, and premises, with the appurtenances, under and subject to the following, amongst other terms and conditions, that is to say, that he should not grow more than twenty-two acres of winter corn in any year; that the wheat land should be summer fallowed and well manured for the crop; that the Plaintiff should spend all the fodder, hay, straw, turnips, &c. on the premises; and in all respects should occupy the said land in a husbandlike manner, to wit, at, &c. The Defendant then averred, that the Plaintiff did not in the summer next preceding the expiration of his said tenancy and the time when he so sowed the said field called the *Rack Field* with wheat as aforesaid, summer fallow the said field called the *Rack Field*, and well manure the same for the said crop of wheat so sown thereon at the wheat seedness preceding the expiration of his said term as aforesaid, but wholly neglected so to do; and on the contrary thereof, sowed the said field called the *Rack Field* with wheat at the wheat seedness next before the expiration of his said tenancy without summer fallowing and well manuring the same for the said crop of wheat, the said field having been sown with and producing a crop of turnips in the season next before the wheat seedness when the said field was so sown by the Plaintiff with wheat as in the

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said replication mentioned, contrary to a husbandlike manner, and to the tenor and effect, true intent and meaning, of the terms and conditions on which the Plaintiff so held and occupied the said field as such tenant thereof as aforesaid, to wit, at, &c.

Demurrer and joinder.

Russell Serjt. in support of the demurrer. The rejoinder is ill, because the custom of the country as to the 'way-going crop is not excluded by the conditions of demise, as those conditions do not affect the rights of an off-going tenant. At all events the Defendant cannot take advantage of the breach of those conditions, because such breach was a matter solely between the off-going tenant and his landlord.

The conditions of demise, as set forth in the rejoinder, do not exclude the custom of the country. *Wigglesworth* v. *Dallison* (*a*) established the law, that though a farm be held under a written agreement, the custom of the country may well be insisted upon, provided such custom be not excluded by the terms of the agreement. Now here the agreement to spend all the straw upon the premises clearly does not relate to the time or terms of quitting. The off-going tenant could not spend the straw on the premises. According to *Senior* v. *Armytage* (*b*), a custom for the tenant of a farm in a particular district to provide labour, tillage, sowing, and all materials for the same in his 'way-going year, and for the landlord to make him a reasonable compensation, is valid in law, and may be insisted upon, although the farm be held under a written agreement, provided the custom be not thereby expressly excluded. And in that case one clause in the agreement was, "That all manure, compost, &c. was to be used upon

(*a*) *Doug.* 201. (*b*) *Holt's N. P. C.* 197.

the

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the farm." In *Webb* v. *Plummer* (*a*) the agreement contained express stipulations as to the mode of quitting the farm. The decision turned on those stipulations, and therefore confirmed the principle established by the other two cases.

And the tenant's breach of the conditions in the agreement is a matter solely between himself and his landlord. *Boraston* v. *Green* (*b*) is in point. There it was holden, that an action did not lie by an in-coming tenant to recover the value of the 'way-going crops taken by an off-going tenant, contrary to the stipulations in his lease, because the remedy for any mismanagement of the land during the preceding tenancy appertains to the landlord and not to the in-coming tenant.

Jones Serjt. *contrà*. The custom is confessedly excluded where there is an express stipulation as to the terms of quitting. And where the terms of the holding are incompatible with the off-going tenant's taking the 'way-going crop, it is the same thing as if there were an express stipulation to that effect. Here there is an express stipulation that the occupier shall sow his wheat on a summer fallow, which is incompatible with his having a 'way-going crop. If, notwithstanding this stipulation, the Plaintiff can recover on the custom, he obtains a crop by his own wrong, and the open violation of his contract.

Russell. The wrong, if any, is a wrong to the landlord, and not to the in-coming tenant; and the remedy is for the landlord alone. But the stipulation as to summer fallowing is a stipulation touching the mode of holding, and not the mode of quitting.

Cur. adv. vult.

(*a*) 2 *B.* & *A.* 746. (*b*) 16 *East*, 71.

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TINDAL C. J. The question in this case arises on the sufficiency of the Defendant's rejoinder to that replication of the Plaintiff which he has put in to the Defendant's second plea of justification.

The Plaintiff, in his replication, sets out a custom within the parish where the *locus in quo* is situate, for every tenant and occupier of land in the parish, holding from year to year, whose tenancy of land expires at *Lady Day*, "where he has sown any of his lands with wheat on a fallow at the wheat seedness next before the expiration of his tenancy, and has afterwards reaped the wheat growing on such land, as and for a part of his 'way-going crop, to take and enjoy to his own use two third parts of such wheat, and to leave the other third for the in-coming tenant; and where such tenant has sown any of his land with wheat, after a crop of turnips, at the wheat seedness next before the expiration of his tenancy, to take to his own use, and to reap, cut, and carry away when ripe and fit to be reaped and carried away, his 'way-going crop; that is to say, one half of the wheat so sown after the crop of turnips; and to leave the other remaining half part thereof for the use of the incoming tenant." Now, in answer to this replication, the Defendant rejoins, that the Plaintiff held his farm, of which the *locus in quo* forms part, "under and subject to the following conditions; that is to say, that he should not grow more than twenty-two acres of winter corn in any year; that the wheat land should be summer fallowed, and well manured for the crop; that the Plaintiff should spend all the fodder, &c. on the premises, and occupy the land in an husbandlike manner;" and the Defendant then proceeds to allege, "that the Plaintiff did not summer fallow the field in which, &c., and well manure the same for the said crop of wheat, but, on the contrary, sowed the said field with wheat at the wheat seedness next before the expiration of his tenancy,

tenancy, without summer fallowing and well manuring." The point, therefore, is, whether the terms upon which the Plaintiff held his farm are so inconsistent with custom for the 'way-going crop as to prevent the Plaintiff from claiming, under the custom, his right to the share of the wheat after he had reaped it, and also the right to drive his waggons on to the land to take it away.

Now it seems clear that the Plaintiff, in order to shew any title to the wheat, must bring himself within the custom for the 'way-going crop; for inasmuch as the wheat was growing, at the time it was cut, on land occupied by the Defendant, such wheat would *primâ facie* belong to him; and the Plaintiff could only make title to it, either under a reservation in his former lease, which being granted by the same person under whom the Defendant holds, and being prior in point of date, would bind the Defendant; or by a custom which binds the Plaintiff and his former landlord, and through him the present Defendant: but there was no reservation or agreement contained in the lease applying to a 'way-going crop, and, consequently, the Plaintiff's right to the wheat, if it exists, must depend upon bringing his case within the custom.

It is contended, however, on the part of the Defendant, that the Plaintiff held on such terms as exclude the application of the custom at all; or, in other words, that holding as he did, on the condition that the wheat land should be summer fallowed, no custom in the parish, for a 'way-going crop of wheat sown after a crop of turnips, could apply to his case; and this appears to be the real question between the parties.

It may be useful to consider this case as if the contest arose between the out-going tenant and the landlord, for that is the strongest test to which the right of the out-going tenant can be submitted.

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It may be admitted, that if any condition is found in the lease necessarily repugnant to or inconsistent with the custom, the latter is excluded; for it can only be called in aid where the former is silent upon the subject.

In considering whether there is in this case such inconsistency or repugnancy, the first observation that arises is this; that the agreement set out in the rejoinder is silent altogether as to any terms on which the tenant shall quit; the stipulation is confined expressly to the period of *holding* by the tenant. It adverts to nothing that is to take place at the termination of the tenancy; it speaks only of terms of holding during its continuance. There is nothing, therefore, in such an agreement, directly at variance with the application of a custom between the landlord and tenant, where such custom does not come into force and existence until the expiration of the term. The rights of the landlord and tenant may be governed by the terms of the agreement during the tenancy, and by the terms of the custom immediately afterwards. And this distinguishes the present case from that of *Webb* v. *Plummer*, where there were express stipulations relating to the rights of the out-going and in-coming tenant at the termination of the lease, and which, therefore, were held to exclude the custom.

In the next place it is to be observed, that the custom is in the affirmative, viz. that the tenant shall have one proportion of the wheat for a 'way-going crop, if sown after a summer fallow, another proportion if sown after turnips. The covenant in the lease is affirmative also, viz. that the wheat land shall be summer fallowed. Why may not the affirmative custom and the affirmative covenant subsist together; the landlord having the right to recover a compensation in damages if the affirmative covenant is not observed; the tenant, on the other hand, claiming his 'way-going crop in wheat

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wheat sown after turnips, according to the affirmative terms of the custom? The Defendant requires the same effect to be given to the affirmative stipulation that the tenant would sow after summer fallowing, as if there had been an express stipulation in the negative, either that the tenant should take no 'way-going crop on his quitting; or as if he had agreed, that in case he sowed wheat on land not summer fallowed he would forfeit his claim to a 'way-going crop thereon; in both which latter cases no doubt could be entertained but that the custom would be excluded by the express contract of the parties. Again, it is to be observed, that there is another condition of holding, viz. that the tenant should not grow more than twenty-two acres of winter corn in any year; and if the landlord has the right to exclude the custom in the case already considered, so also he ought to be able, if the tenant exceeded that quantity, to contend that the corn would be his own; the one is as inconsistent with the existence of the custom in its alleged extent as the other. But in the case of *Boraston* v. *Green* it was held that the landlord could not have his election, either to take a small compensation in damages for a trifling excess of sowing beyond the twenty-two acres, or the 'way-going crop itself. Indeed it would be difficult to say at what precise time the property in this corn can be supposed to vest in the landlord. At the moment wheat is sown upon turnips the property is in the tenant, and at all events would continue so until the expiration of the term. The property in the corn would not vest in the landlord, though sown in breach of the covenant. Again, at the moment the wheat is sown, a right of action for damages would vest in the landlord, and so would continue to the end of the term. It is difficult to perceive any principle on which the landlord's right to an action for damages ceases, and the property in the growing wheat becomes

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vested in him instead thereof. The case of *Boraston* v. *Green*, both in its decision and in the reasons given by Lord *Ellenborough* and Mr. Justice *Bayley*, go strongly to the principle, that the landlord would have his remedy by action, and the tenant would have the wheat under the custom.

Now if this is the conclusion, in case the landlord had taken the premises at the expiration of the term, it must be equally so at least where there is a new in-coming tenant. For here the landlord lays no claim at all to the crop: he does not even insist upon damages for the breach of covenant. But the tenant, who is not entitled to those damages, sets up the breach of covenant made with his landlord as a ground for divesting from the outgoing tenant the property in the corn which he claims under the custom.

Indeed it might be fairly contended that the custom set out in the record is evidence of an agreement made directly between the out-going and the in-coming tenants, to which the in-coming tenant upon the facts pleaded appears to have given his assent; and if so, the right of action for damages on the part of the landlord against the out-going tenant appears to be *res inter alios acta*, which can have no effect on the rights of the Plaintiff and Defendant under such agreement.

On these grounds we think the custom still applies to give the off-going tenant the right to a proportion of the corn sown by him after turnips, leaving the landlord to his remedy for breach of covenant. And we are glad to find the law concurs with the justice and honesty of the case when we give

Judgment for the Plaintiff.

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May 3.

Debt on a bond voluntarily entered into by Defendant, the putative father of a bastard, to pay the Plaintiffs, parish officers, 2*s.* 6*d.* a week as long as the child should be provided for at the expense of the parish. Plea, that the Defendant was ready and willing to provide for the child, and requested the Plaintiffs to deliver the child to him, but that the child had been provided for by the Plaintiffs, as parish officers, of their own wrong; Held ill.

DEBT on bond. The Plaintiffs, *Pope*, *Sutthery*, *Deborah Stratton*, *Flexman*, and *Puddephatt*, as overseers of the poor of the parish of *Chesham*, declared that the Defendant by his certain writing obligatory, sealed with his seal, acknowledged himself to be held and firmly bound to *James Pope* and *John Sutthery*, churchwardens, *William Gomm*, *James Clare*, *Benjamin Batchelor*, and *John Allnutt*, overseers of the poor of the parish of *Chesham* aforesaid, in the sum of 100*l.*, to be paid to the said *J. Pope*, *J. Sutthery*, *W. Gomm*, *J. Clare*, *B. Batchelor*, and *J. Allnutt*, or their certain attorney, executors, administrators, or assigns; which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting that *Hannah Atkins*, of the parish of *Chesham*, in the county of *Bucks*, single woman, did in and by her voluntary examination in writing, taken on oath before *William Lowndes*, Esq., one of His Majesty's justices of the peace for the said county, declare herself to be with child, and that the said child was likely to be born a bastard, and to be chargeable to the said parish of *Chesham*, and that the Defendant was the father of the said child; and also reciting that the Defendant, in order to indemnify the said parish from the maintenance of the said child as much as in him lay, had applied to the said churchwardens and overseers to take his security for the maintenance of the said child, which they had consented to do as thereinafter was mentioned; and that therefore the Defendant had entered into that his bond as security for the payment of the sum of 40*s.* for the month's lying-in of the said *Hannah Atkins*,

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Atkins, and the payment of the weekly sum of 2*s.* 6*d.* from the expiration of the said month for the support of the said bastard child so long as he or she should continue to be provided for at the expense of the said parish; the condition of the said writing obligatory was declared to be such, that if the said Defendant, his heirs, executors, or administrators, did and should well and truly pay, or cause to be paid, unto the said *J. Pope*, *J. Sutthery*, *W. Gomm*, *J. Clare*, *B. Batchelor*, and *J. Allnutt*, or either of them, and their successors, churchwardens and overseers for the time being, the sum of 40*s.* for the month's lying-in of the said *Hannah Atkins*, and also the weekly sum of 2*s.* 6*d.* for and on account of all manner of rates, costs, charges, and expenses which should or might in any manner arise, happen, come, grow, or be imposed upon the said churchwardens and overseers for the time being, touching or concerning the said bastard child begotten on the body of the said *Hannah Atkins* as aforesaid, the sum of 2*s.* 6*d.* to be paid weekly and each and every week for and during so long time as the said bastard child should continue to live and be provided for at the expense of the said parish, and to begin immediately from and after the expiration of the month's lying-in of the said *Hannah Atkins*, then the said writing obligatory was to be void and of none effect, otherwise to remain in full force, power, and virtue. The Plaintiffs then averred, that after the making of the said writing obligatory, to wit, on, &c. the child with which the said *H. Atkins* was so pregnant, and whereof the Defendant was such reputed father as aforesaid, was born and was still living, to wit, at, &c.; yet the Defendant, although often requested so to do, did not, nor would, from and after the expiration of the month's lying-in of the said *H. Atkins*, well and truly pay or cause to be paid unto the said churchwardens

and

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and overseers, and their successors for the time being, the said weekly sum of 2*s.* 6*d.* for and on account of all manner of rates, costs, charges, and expenses which did arise, happen, come, or were imposed upon the said churchwardens and overseers for the time being touching or concerning the said bastard child begotten on the body of the said *H. Atkins* as aforesaid, for and during so long time as the said bastard child did continue to live and be provided for at the expense of the said parish, but wholly refused and neglected so to do; and on the contrary thereof, after the making of the said writing obligatory, and after the expiration of the month's lying-in of the said *H. Atkins*, and whilst certain successors of the said churchwardens and overseers in the said writing obligatory mentioned, to wit, the said *J. Pope* and *J. Sutthery* were churchwardens, and *W. Weedon*, *W. Puddephatt*, *J. Howard*, and *S. Puddephatt* were overseers of the poor of the said parish, and during the time the said bastard child did continue to live and be provided for at the expense of the said parish, to wit, on, &c. at, &c. a large sum of money, to wit, the sum of 4*l.* 10*s.*, for and on account of thirty-six of the said weekly payments in the said condition mentioned, became and was due and owing from the Defendant, and still was in arrear and unpaid, contrary to the form and effect of the said writing obligatory and of the said condition thereof, to wit, at, &c. And the Plaintiffs, as overseers as aforesaid, assigned as a further breach of the said condition of the writing obligatory, that afterwards and whilst the Plaintiffs, *J. Pope* and *J. Sutthery* were churchwardens, and the Plaintiffs *D. Stratton*, *J. Flexman*, *J. Puddephatt* the younger, and *G. Stevens*, were overseers of the poor of the said parish, the Plaintiffs being successors of the said churchwardens and overseers in the said writing obligatory and condition

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dition mentioned as aforesaid, and during the time the said bastard child did continue to live and be provided for at the expense of the said parish, to wit, on, &c. at, &c., a certain other sum of money, to wit, the sum of 12*s.* 6*d.* of like lawful money, for and on account of five other of the said weekly payments in the said condition mentioned became and was due and owing from the Defendant, and still was in arrear and unpaid, contrary to the form and effect of the said writing obligatory and of the said condition thereof, to wit, at, &c., by reason of which said breaches the said writing obligatory became forfeited, and thereby, and by force of the statute in such case made and provided, an action accrued to the Plaintiffs as such overseers as aforesaid, &c.

The Defendant pleaded, first, *non est factum*; secondly, that before the weekly payments claimed by the Plaintiffs became due, the child was nine years old, able to earn wages and support itself by employment; and that the Defendant was willing to employ it and pay reasonable wages, of which the Plaintiffs had notice, but voluntarily and of their own wrong provided for the child:

Thirdly, that before the said several times when the said supposed weekly payments in the said supposed breaches of the condition of the said writing obligatory in the said declaration mentioned were supposed to have become due and owing from the Defendant, to wit, on, &c. at, &c. the said bastard child had attained a certain age, to wit, the age of nine years, and was then past the age of nurture; and the said bastard child, at the time of the making the request thereafter mentioned, was and thence hitherto had been under the power and control of the said overseers and churchwardens of the said parish for the time being: and the Defendant farther said,

said, that he the Defendant was then and there, and thence hitherto had been and still was able and willing wholly and completely to keep and maintain and provide for the said bastard child without the aid or assistance of the said parish; and then and there and theretofore and before any of the said times last above mentioned, to wit, on, &c. at, &c., requested and desired the then overseers of the said parish, and often afterwards requested the Plaintiffs, since they became overseers, to deliver over the said bastard child to his the said Defendant's care and management, whereby the said bastard child might have been provided for, without being chargeable to the said parish: but that the said bastard child had, during all the respective times in the said respective supposed breaches mentioned, been provided for at the expense of the said parish by the Plaintiffs and the respective overseers and churchwardens of the said parish for the time being, voluntarily and of their own wrong, and if the Plaintiffs or the said parish were damnified, they had been and were damnified of their own wrong, &c.

Upon the first plea the Plaintiffs joined issue. To the second they replied, that the child was not able to work and support itself; on which issue was joined: and to the third, that the child was not under the power and control of the said overseers and churchwardens of the said parish for the time being, in manner and form as the Defendant had alleged; on which issue was also joined.

At the trial before *Tindal* C. J., *London* sittings after last *Michaelmas* term, a verdict was found for the Plaintiffs on the two first issues, and a verdict for the Defendant on the third, with leave for the Plaintiffs to move to enter up a verdict for *5l.* 2*s.* 6*d.* on that issue also, if the Court should be of opinion that the third plea was not an answer to the action.

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Wilde Serjt. accordingly moved for judgment *non obstante veredicto.*

The plea is no bar to the action. According to the more recent authorities, the putative father has no right to the custody of a bastard, and public policy requires that such should be the law. He is *nullius filius*, and cannot take by gift or devise, until he has attained by time a name of reputation. (*a*) In *Sherman*'s case (*b*), indeed, *Twisden* J. said, — "The putative father might take the child and maintain it himself; and there is a dictum to the same effect in *Burwell*'s case (*c*): in *Smith*'s case (*d*) it is intimated that the putative father might have taken the child at first, but not afterwards; for "he may sell him or make away with him, as too often happens:" in *Rex* v. *Hodnett* (*e*) it was held, that bastards are within the meaning of the Marriage Act, which requires the consent of the father, guardian, or mother, to the marriage of persons under age, and that the putative father might give such consent: and in *Newland* v. *Osman* (*g*), it was considered by the Court that the putative father might take the child and maintain it himself, and that this was the reason why orders for the maintenance of such children must not be limited to any certain time: in *Hulland* v. *Malken* (*h*) the Court gave no opinion on the point, except by referring to the language of *Grotius*, that the mother is the only certain parent. But in *Rex* v. *Moseley* (*i*), and *Rex* v. *Soper* (*k*), the child was restored to the mother under a writ of *habeas corpus*, Lord *Kenyon* saying the putative father had no right to the custody of

(*a*) *Co. Litt.* 3.
(*b*) 1 *Ventr.* 210.
(*c*) 1 *Ventr.* 48.
(*d*) 1 *Bott*, 490.
(*e*) 1 *T. R.* 96.
(*g*) 1 *Bott*, 459.
(*h*) 2 *Wils.* 126.
(*i*) 5 *East*, 224. n.
(*k*) 5 *T. R.* 278.

the

the child; and in *Rex* v. *Hopkins* (*a*) Lord *Ellenborough* likewise restored the child to its mother. So, in *Exparte Knee* (*b*), it was held that the mother of a bastard is entitled to the custody of the child in preference to the putative father, although, from his circumstances, he may be better able to educate it. And in *Strangeways* v. *Robinson* (*c*) *Mansfield* C. J., without deciding the point, said, "Considering who the persons are who are likely to be fathers of children of this description, it is a very strong position to lay down, that any father, no matter who, any ragged vagabond whatever, although much less competent to educate the child than those who before had the custody, shall have a right to call for the custody of the child."

A rule *nisi* having been granted,

E. Lawes Serjt. shewed cause.

The cases of *habeas corpus* which have been referred to do not apply to the question before the Court, because the restoring the child to the mother in a contest between the putative father and the mother is not incompatible with restoring the child to the putative father in a contest between the putative father and the parish officers. There is no decision adverse to the claim of the father in such a case; all the dicta in the books are in his favour; and it is much more for the interest of the child to be under the care of a father able and willing to maintain it, than exposed to the indifference or harshness of parish officers. In *Richards* v. *Hodges* (*d*) the question went off on a defect in the pleadings; and in *Strangeways* v. *Robinson* the plea was held bad for want of an averment, which the Defendant's plea contains, that the child was in the power of the parish officers.

(*a*) 7 *East*, 579.
(*b*) 1 *N. R.* 148.
(*c*) 4 *Taunt.* 498.
(*d*) 2 *Saund.* 83.

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But the bond, in the present case, is not a bond on which the Plaintiffs are entitled to sue. They are the successors of the parish officers to whom it was given; and the statute 54 G. 3. c. 170. s. 8., which enables the overseers for the time being to sue on bonds given to their predecessors, applies only to bonds given to indemnify a parish: the Defendant's bond is void, being neither an indemnity bond nor a bond given upon adjudication by a magistrate, such as is required by the statute 49 G. 3. c. 68. s. 2. at the hands of putative fathers, but a mere voluntary bond to pay 2s. 6d. a week; and if from illness of the child, or any other accident, the expenses attending it had exceeded 2s. 6d. a week, the parish would not have been indemnified.

Bompas Serjt. in support of the rule. The weight of authority is adverse to the right of the putative father to have the custody of the child; and the decisions in cases of *habeas corpus* are relevant, because, if the putative father could claim the child as against the parish, he might, upon a question of maintenance, indirectly obtain the child as against the mother.

Then as to the validity of the bond, *Middleham* v. *Bellerby* (*a*) is in point to shew that it is available against the obligor, although not such a bond as is required by 6 G. 2. c. 31. s. 1., or 49 G. 3. c. 68. s. 2. The bond, in that case, was given voluntarily for the payment of 1*l.* 19*s.* every three months for the maintenance of the child. That cannot be distinguished in principle from a bond for the payment of 2s. 6d. a week. Such a bond is a bond of indemnity to that extent; at all events within the spirit of the 54 G. 3. c. 170., which is a remedial act, and ought to be construed liberally for the protection of parishes.

(*a*) 1 *M.* & *S.* 310.

TINDAL

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TINDAL C. J. This question comes before the Court upon a motion on the part of the Plaintiffs for leave to enter up judgment for the sum of *5l. 2s. 6d.*, being the amount of damages assessed by the jury upon a bastardy bond, notwithstanding the verdict found by the jury for the Defendant on the third plea.

The bond was not in the usual form of such bonds given in compliance with the statute, a bond to indemnify and save harmless the parish officers and their successors against all costs, charges, and expenses which they might incur by reason of the birth and maintenance of the bastard child; but it was a bond conditioned "to pay the parish officers a weekly sum of *2s. 6d.* for and on account of all such costs, charges, and expenses; the said sum to be paid weekly and every week for and during so long time as the said bastard child should continue to live and be provided for at the expense of the said parish." And upon shewing cause against the Plaintiffs' rule, two objections were made to the Plaintiffs' right to recover; first, that the bond was not an indemnity bond, and, therefore, no right of action passed to the present Plaintiffs, who sue as successors to the obligees; and, secondly, that the bond not being given as an indemnity bond under the statute, is void at law. As either of these objections, if well founded, would prevent the necessity of considering the question raised by the Plaintiffs' motion, it will be best to consider them first in point of order.

Now, as to the first objection, we think the legal construction of the bond is, that it is a bond of indemnity to a limited extent. The condition begins by reciting, "That the Defendant, in order to indemnify the parish from the maintenance of the said child as much as in him lay, applied to the churchwardens and overseers to take his security for the maintenance of the said child, which they had consented to do as thereinafter mentioned:"

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and it then proceeds to recite, "and therefore that he had entered into that his bond for the payment of the sum of 40*s.* for the month's lying-in, and the payment of the weekly sum of 2*s.* 6*d.* from the expiration of the said month, for the support of the said bastard child so long as he should continue to be provided for at the expense of the said parish." And this recital shews sufficiently the intention of the parties that the parish should be indemnified up to a certain extent; an extent, probably, calculated with reference to the condition and means of the Defendant. But the statute 54 *G.* 3. *c.* 170. *s.* 8., by which succeeding officers are enabled to sue on parish securities, is not restrained to the case of indemnity bonds, strictly and properly so called; but it enacts in more general terms, "That all securities given for indemnifying any parish for the maintenance of any bastard child, or any expenses in any way occasioned to such parish by reason of the birth or support of any bastard child born within such parish, or chargeable thereto, shall be vested in the overseers, &c. for the time being." It would, therefore, as it appears to us, be too narrow a construction of a statute intended to be remedial, if we were to hold the present bond, intended by the parties to be an indemnity to a limited extent, and a description of security well known to be in use at the time when the statute passed, not to be within the operation of the act.

As to the second objection, after the case of *Middleham* v. *Bellerby*, we think the present bond is a valid security. The bond is not given under the statute 49 *G.* 3. *c.* 68. *s.* 3. There is no proceeding against the putative father under that statute to compel him to give security; but after the voluntary examination of the woman, the putative father gives a voluntary security for the payment of a weekly sum so long as the bastard child should continue to live and be provided for by the parish.

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parish. Such a security has been held to be legal in the case referred to; it is a species of security in ordinary use; and there seems no reason, on general principle, why it should be held void.

The question, therefore, arises, and must be considered by us, Whether the Plaintiff is entitled to recover notwithstanding the verdict on the issue raised on the third plea; that is, in other words, whether the third plea discloses no matter of legal defence to the action, though every allegation contained in it be admitted to be true. The broad objection that has been taken to the plea is, that the putative father has no right by law to the custody of the bastard child; that it is equally against law and policy that the parish officers should deliver up the child upon his request; and, consequently, that as the legal obligation upon the parish to provide for the child's maintenance still remains, the offer to take him back will not relieve the putative father from his bond to indemnify the parish.

No decided case has been cited in support of this proposition, and perhaps on consideration of the authorities referred to, they would rather make against than support it. In the view, however, which we take of the present case, it becomes unnecessary to decide the point. For the question in this case does not arise in an action upon a bond conditioned in terms to indemnify the parish; in which, by the rules of pleading, the Defendant may answer the action by pleading specially what had been done under the condition, and conclude by saying, that if the Plaintiff is damnified, it is by his own fault; but this is an action brought upon a bond conditioned for the performance of one particular duty, viz. that the Defendant should pay to the parish officers the weekly sum of 2*s.* 6*d.* for and on account of all rates, costs, charges, and expenses which might in any manner happen, &c. "the said sum of 2*s.* 6*d.* to be paid weekly

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and each week for and during so long time as the said bastard child should continue to live, and be provided for at the expense of the said parish." Under such a condition the plea, and the only plea, is performance, to which the present plea does not amount. For it is clear upon the face of the declaration, that the child continued to live, and be provided for at the expense of the parish. This being a bond not given under the statute 49 G. 3., must be considered as a voluntary bond between the parties; and if a bond given voluntarily, it was competent for the parties to have introduced any qualification into the condition, as to the power of the putative father to demand the bastard child when he was willing and able to support it, and as to the ceasing of his liability in case of refusal to deliver up the child. There is, however, no such provision, but the express condition before stated. To introduce such a term into the condition, would be not only adding to the written contract between the parties, but violating the apparent intention of the parties, which was, that if the parish took the child, under the terms of this bond, the father should agree to leave the child in their hands so long as it required to be maintained. The bond, therefore, being thus conditioned, we think the statement in the plea of facts from which the inference is drawn, that the Plaintiffs, if damnified, are damnified of their own wrong, forms no answer in point of law to an action on the bond, and we think the rule ought to be made absolute.

Rule absolute.

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BARDWELL and Others *v.* LYDALL.

May 3.

ASSUMPSIT upon a guaranty contained in a letter addressed by the Defendant to the Plaintiffs in the following terms: — "In consideration of your giving credit in the way of your trade to *Lionel Mayhew*, I guarantee to you the payment of any debt which he may contract with you from time to time, as a running balance of account to any amount not exceeding 400*l.*"

It appeared at the trial that the Plaintiffs, on the faith of that guaranty, had furnished *Mayhew* with goods to an amount far exceeding the 400*l.*; and that *Mayhew* becoming embarrassed, assigned his effects to trustees for the payment of his creditors, pro ratâ, when the Plaintiffs claimed a debt of 625*l.* against his estate, and received from the trustees in common with the rest of the creditors, a dividend of 8*s.* 7*d.* in the pound, on the whole debt. This dividend amounted to 268*l.* 6*s.* 4*d.*, leaving 356*l.* due from *Mayhew* to the Plaintiffs: The present action was brought to recover that sum, being the difference between the dividend and the whole debt.

On the part of the Defendant it was contended, that the Plaintiffs had no right to deduct the whole sum received as a dividend from the gross amount of the debt, and to hold the Defendant liable on the guaranty for the residue of the demand, up to the extent of the guaranty; but that the dividend received by the plaintiffs was to be applied rateably to the whole debt; as well the part covered by the guaranty as the part which was left uncovered; and consequently a rateable deduction was to be made for the sum covered by the guaranty.

Defendant guaranteed Plaintiffs against debts to be contracted by *L. M.* to the extent of 400*l.* — *L. M.* became indebted to Plaintiffs to the amount of 625*l.*, upon which, by a composition with his creditors, he paid them 8*s.* 7*d.* in the pound, leaving due to the Plaintiffs out of their whole claim 356*l.*

The Defendants being sued for that sum on their guaranty,

Held, that they were entitled to deduct from it 171*l.* 13*s.* 4*d.*, the amount of the dividend of 8*s.* 7*d.* in the pound upon 400*l.*

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The Defendant had paid into Court the sum of 118*l.*, and the jury found a verdict for the Plaintiffs with 238*l.* 18*s.* damages, making, with the 118*l.* paid into Court, 356*l.* 18*s.*, the full amount of the debt remaining due to the Plaintiffs; leave being reserved to the Defendant to move to reduce the damages, if the Court should be of opinion that the rateable deduction was to be made on the principle contended for by him.

Russell Serjt. accordingly, upon the ground taken at the trial, obtained a rule *nisi* to reduce the verdict from 238*l.* 18*s.* to 110*l.* 6*s.* 8*d.*, which sum added to the 118*l.* paid into Court, and 171*l.* 13*s.* 4*d.*, the dividend upon 400*l.* at 8*s.* 7*d.* in the pound, would make up the 400*l.* for which the Defendant was responsible on his guaranty. *Paley* v. *Field* (*a*) was cited and relied on. There the Court held that the dividend was received on each portion of the debt; and that as to the portion of the debt covered by the guaranty, the creditor was a trustee for the surety.

Taddy Serjt. shewed cause. The Plaintiffs are entitled to retain their verdict for the amount of the deficiency upon the whole of *Mayhew*'s debt, that deficiency being less than 400*l.*; and are not confined to the deficiency upon 400*l.* of the debt, after receiving the dividend on that 400*l.* The very object of a guaranty is to secure to the party guaranteed 20*s.* in the pound. This guaranty is for any sum, not exceeding 400*l.*, which may be due to the Plaintiffs, from time to time, as a running balance of account; and 356*l.* remains due to them on the balance of their account with *Mayhew*. They resort to his estate first for a debt of 625*l.* They receive 268*l.* 6*s.* 4*d.* If *Mayhew* had not assigned to

(*a*) 12 *Ves.* jun. 435.

trustees,

trustees, but had himself paid the 268*l.* 8*s.* 4*d.*, and had then failed, could there be any doubt that the Defendant would have been liable to pay the 356*l.* as the balance due? It is not till the Plaintiffs have received all they can from *Mayhew*, that the balance due from him can be ascertained. And it can make no difference whether *Mayhew*'s estate remain in his own hands or be transferred to a trustee; whether the Plaintiffs receive part payment from *Mayhew* himself or from the trustee. In *Paley* v. *Field*, the dividend was held to belong to the Plaintiff, because the Defendants had been paid all they could have received upon the bond in any event; and if the Plaintiffs here had received the whole of their debt, the case would have applied. At any rate a decision in equity cannot affect the Plaintiffs' legal claim.

Russell. A dividend is a payment of so much upon each separate pound of the creditor's debt: the guaranty extends only to 400*l.* of *Mayhew*'s entire debt, and 8*s.* 7*d.* having been received upon each of those four hundred pounds, the Plaintiffs can only come upon the Defendant for the 11*s.* 5*d.* remaining due on each pound; 118*l.* having been paid into Court towards that amount, 110*l.* 6*s.* 8*d.* is all that the Defendant has to supply. The calculation, in such a case, must be the same whether in law or in equity.

Cur. adv. vult.

TINDAL C. J. This was an action upon a guaranty, contained in a letter addressed by the Defendant to the Plaintiffs in these terms, — "In consideration of your giving credit in the way of your trade to *Lionel Mayhew*, I guarantee to you the payment of any debt which he may contract with you from time to time as a running balance of account, to any amount not exceeding 400*l.*"

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It appeared at the trial that the Plaintiffs, on the faith of this guaranty, had furnished *Mayhew* with goods to an amount far exceeding the 400*l.*; and that *Mayhew* becoming embarrassed, assigned his effects to trustees for the payment of his creditors, *pro ratâ*, when the Plaintiffs claimed a debt of 625*l.* against his estate, and received from the trustees, in common with the rest of his creditors, a dividend of 8*s.* 7*d.* in the pound on the whole debt.

The present action was brought to recover the difference between the dividend and the whole debt, being a sum less than the 400*l.* secured by the guaranty.

On the part of the Defendant it was contended, that the Plaintiffs had no right to deduct the *whole* sum received as a dividend from the gross amount of the debt, and to hold the Defendant liable on the guaranty for the residue of the demand, up to the extent of the guaranty; but that the dividend received by the Plaintiffs was to be applied rateably to the whole debt, as well the part covered by the guaranty as the part which was left uncovered, and consequently a rateable deduction was to be made for the sum covered by the guaranty. The Defendant had paid into Court the sum of 118*l.*, and the jury found a verdict for the Plaintiffs, with 238*l.* 18*s.* damages, being the full amount of the debt remaining due to them; leave being reserved to the Defendant to move to reduce the damages, if the Court should be of opinion that the rateable deduction was to made on the principle contended for by him.

And upon consideration, we are of opinion that such deduction ought to be made. If the whole amount of the debt from *Mayhew* had not exceeded the 400*l.*, it is clear that the Defendant would have received the full benefit of the dividend of 8*s.* 7*d.* in the pound, as he could not have been answerable under the guaranty for more than the remainder, after the deduction of such dividend;

dividend; and although the amount of the debt does in this case exceed the 400*l.*, and thereby the position of the creditor is so far altered, that one part of his debt, viz. to the extent of 400*l.*, is guaranteed, and the remainder not, still there seems no reason why the application of a payment of so much in the pound upon the whole debt should in any way be affected by the collateral circumstance of the guaranty; or why such payment should not be applicable as well to the 400*l.* guaranteed as to the part uncovered by the guaranty. For, suppose the sum which exceeds the 400*l.* had been covered by the guaranty of another person, could it be contended that the Plaintiffs might have applied the whole of the dividends to either part of the demand at their own election, and thus have varied, at their own pleasure, the extent of the responsibility of the two sureties? In the case supposed, we think each of the sureties might have claimed a rateable deduction, out of each pound of the amount of debt to which their respective guaranties extended. And if so, the same result appears to us to follow, whether the excess beyond the 400*l.* is covered by the guaranty of a stranger, or the creditor is contented to become his own surety for the residue, &c., and to look for payment of it to the principal debtor alone.

Again, suppose in the principal case the Defendant *had paid* the 400*l.* to the Plaintiffs *before* the Plaintiffs had made their claim against *Mayhew's* estate. There could be no doubt, in that case, that if they proved the whole demand, they would have been trustees for the Defendant for the dividend on the 400*l.*; or, if they had declined to prove, that the Defendant might have received the dividend on that sum, if the trust-deed admitted of such an arrangement. And what difference can it make in the equitable rights of the Defendant, whether such payment is made before, or is sought to

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be enforced against him after, the payment *pro ratâ* out of the estate of the principal?

Indeed, the case seems to be decided as to the right of the surety to claim the benefit of the deduction now contended for, in a court of equity, by the case of *Paley* v. *Field*, which is in substance and effect the same as the present. The Court there held, that the dividend was received on each portion of the debt, and that as to the portion of the debt covered by the guaranty, the creditor was a trustee for the surety. The Master of the Rolls there observing, "That unless this were so, it would follow that the guaranty would operate to compel the surety to contribute, in effect, to indemnify *Field* against a loss, against which it was expressly provided that he should not be indemnified, viz. a loss occasioned by his advancing more than the sum of 1500*l.*," the extent of the guaranty limited by the bond.

The argument on the part of the Plaintiffs proceeds on the ground, that they may treat the payment as a payment in gross of part of the debt; and, consequently, have the right to deduct it, and to claim the remainder under the guaranty. And, further, it is urged, that whatever may be the decision or doctrine of a court of equity, this is a question in a *court of law*, and the deduction cannot be supported upon any legal ground.

It appears to us, however, that both these objections are answered by adverting to the evidence given in the cause. The payment was not a payment in gross, but a payment specifically made by the trustees, and specifically received by the Plaintiffs, as so much in each and every pound of the whole amount of the debt; so that there is a specified appropriation of payment to each and every part of the demand, which appears to us, in law, to operate as a part-payment of the 400*l.*, as well as a part-payment of the residue.

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Upon this short ground, we think, in the present case, the same deduction may be made in law, to which the Defendants appear entitled in reason and good sense, without compelling them to have recourse to a court of equity, and, accordingly, we think the present rule should be made absolute.

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Rule absolute.

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THIS was an action on a policy of insurance on goods valued at 2300*l.* on board the ship *George*, insured upon a voyage from *Liverpool* to *Buenos Ayres*, and any port or ports in the river *Plate*; and in the event of a blockade, or being ordered off the river *Plate*, with liberty to proceed to any other port in *South America*, not round *Cape Horn*; with leave to discharge there, or wait for information and return to *Buenos Ayres*. The Defendant subscribed the policy for 300*l.*

The first count of the declaration averred the loss to be by seizure and confiscation, by mariners belonging to a ship of war in the service of the Emperor of *Brazil*. The second, by seizure and detention of persons unknown. The third, by hostile capture by mariners belonging to a ship of war in the service of the Emperor

The sentence of a foreign court of admiralty is not conclusive as to the ground of condemnation, unless it be explicitly stated what the ground is: Held, that this did not appear on a sentence which stated "that the ship *George* had sailed from *Liverpool* knowing of the blockade of *Buenos Ayres* by the Emperor of *Brazil*, from a short distance of which port she was taken, and for that reason ought to be considered as violating the blockade; besides which, it was notorious the captured had endeavoured to get goods into *Buenos Ayres*, as was clear from the evasive answers of the captain; that the captured had not the plausible excuse of going first to *Monte Video*, and thereby complying with the published instructions; from all which, and from what the documents stated, the ship was adjudged good prize."

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of *Brazil*; and the fourth averred the loss by the barratry of the master.

The Defendant pleaded the general issue.

At the trial before *Tindal* C. J., *London* sittings after *Michaelmas* term 1829, a verdict was directed to be entered for the Plaintiff, damages 300*l*., subject to the opinion of the Court on the following case: —

The goods insured were laden on board the *George*, whereof *Robert Hunter* was master, previously to the sailing of the vessel on the voyage insured; and the Plaintiffs were interested, as averred in the declaration. On the 2d of *August* 1826, the *George* sailed from *Liverpool*, bound to *Buenos Ayres*. On the 18th *February* 1826, the following notification appeared in the *London Gazette* of that day: — "It has been notified by the *Brazilian* minister for foreign affairs to his majesty's *chargé d'affaires* at *Rio de Janeiro*, by communication dated 7th *December* last, that the Emperor of *Brazil* had ordered to be instituted a strict blockade of the ports in the river *Plate* belonging to the government of *Buenos Ayres*." The following instructions were given by the owners of the said vessel to the master, previously to his sailing on the voyage in question, viz. —

"Your object, in the first place, is to reach *Buenos Ayres*, but should you be warned off by an intimation from the *Brazilian* cruisers of the existence of the blockade, you will then proceed to *Monte Video*, and land your cargo under the orders of Messrs. *Anderson* and Company's agent there. Messrs. *Anderson* will provide you with other instructions, which you will endeavour to comply with to the best of your power, in all points which are not in contravention of the agreement or your bill of lading, or in opposition to your owner's interests. You will scrupulously guard against performing any act which can be construed into a violation

tion of the laws of blockade, such as may render you exposed to injurious delay or detention. In case you terminate your voyage at *Monte Video*, you will please to consider yourself authorized to enter on any new freight or charter which will prove a remunerating price to the vessel; but if you can previously consult with Messrs. *J. P. Robertson* and Co. in *Buenos Ayres*, we wish you to do it, if no prejudice to the owners shall arise in consequence of the delay. Insurance is done on the vessel for 5000*l.* from *Liverpool* to a port of discharge in the *River Plate*; and on your arrival there, you will give us timely notice to regulate our insurance on your further voyage."

On the 6th of *October* 1826, about six o'clock P. M., the vessel arrived abreast of the port of *Monte Video*, two leagues distance. The wind blowing from the port, and the master not meeting with any ship of war, or any other vessel from which he could obtain any intelligence respecting the state of the port of *Buenos Ayres*, he continued his voyage, and proceeded further up the river *Plate* in pursuance of his instructions, conceiving that the blockade of *Buenos Ayres* no longer existed, until he had got somewhat beyond the point of *Lara*, about 10 P. M. on the night of the 7th of *October*, when he descried the *Brazilian* squadron, and immediately let go his anchor in sight of the squadron. While the ship was at anchor, an officer belonging to the *Brazilian* corvette of war *Ymperica*, came on board the *George*, and took away the ship's register, log-book, and the instructions relative to the voyage, together with other papers relating to the ship and cargo. The master was at the same time conveyed on board the commodore's frigate *Nitroy*, and one half of the crew sent on board the corvette *Ymperica*. The master was detained on board the frigate until the 11th, on which day the *George*,

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George, with the goods on board, was carried into *Monte Video* as a prize by the *Brazilian* squadron. Half the crew of the *George* was detained by the squadron as prisoners of war. The *George* drew sixteen feet of water. The depth of water in the river *Plate*, off *Buenos Ayres*, was not sufficient to have enabled the *George* to get into the harbour of *Buenos Ayres*; but she might have lain in the outer roads, where the cargoes of deeply-laden vessels, bound to *Buenos Ayres*, are usually discharged into lighters. Such outer roads were within the reach of the blockading squadron, and not protected by the fort or batteries of *Buenos Ayres*. After the *George* and the goods were taken into *Monte Video*, proceedings were commenced in the prize-court there; and on the 13th of *December* 1826, the following sentence was pronounced by the Judge of that court: —

"In virtue of summary process against the *English* brig *George*, taken by the van-guard of the imperial squadron now blockading the enemy's port in the river *Plate*, it plainly appears, from all the documents brought forward in the said process, that the said brig sailed from *Liverpool*, knowing of the said blockade, and which the captured do not even deny, neither that her destination was *Buenos Ayres*, from which port, at only a short distance, she was taken; and for this reason it is evident she ought to be considered as violating the said blockade, and which she would have effected, but for the diligence of the capturers, in spite of all the means tried to evade it: neither are the endeavours used by the captured to get a part of the cargo of this prize into *Buenos Ayres* less notorious, but which having not been able to accomplish in other vessels, and the same being returned to *England*, they were in hopes to do in this; and this with all diligence, as is proved by the official report,

report, fol. 57.; and as is clear by the evasions the captain had recourse to in his answers to the interrogatories, and in the clause shewn in the translated letter, fol. 44. and 65.: forasmuch as besides not doing away the proof that *Buenos Ayres* was the first port the shipment was destined for, (in itself criminal), it also happened that the captured had not even the plausible excuse of coming to this port of *Monte Video* first to get intelligence, and thereby comply with the published instructions; on the contrary, it is proved by the log-book translated, fol. 68., that they saw it, and passed even much beyond it, and where they were captured; from all which, and from what the documents state, I judge the said brig *George*, and her cargo, to be good and lawful prize to the capturers; the captured paying the expenses. This process to be remitted to the supreme council of justice.

"DON LUIS JOZE FERNANDEZ DE OLIVERREI.
"*Monte Video*, 13th *Dec.* 1826."

The Plaintiffs' first witness proved that he was the agent for one of the owners of the *George*; that she was a new ship, and that the voyage in question was her first voyage; that she cost 7500*l.*, and was insured for 5000*l.*; that the freight agreed to be paid to the owners was the ordinary freight on a voyage to the river *Plate*, and amounted to the sum of 800*l.*

The second witness proved that the blockade of *Buenos Ayres* ceased on the 1st of *October* 1828; that if the *George*, on arriving abreast of the port of *Monte Video*, two leagues distant, the wind blowing from the port, had gone in to make enquiry, it would have occasioned great delay; that the *George* was a fast sailer, and might have had a great chance of escaping, if, instead of dropping her anchor, she had tacked and run down; that there was nothing dangerous in going into *Monte Video*; but,

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if the wind was blowing strong from the north, that is, from the port, he thought she could not have gone in; that if he had attempted to break the blockade, his conduct would have been to try to escape, and that he should immediately have tacked and stood away.

The Plaintiff's last witness admitted, on cross-examination, that at the time of the voyage he had searched the *London Gazette* for a notification of the raising of the blockade of *Buenos Ayres*, but that he did not find any, and did not go to the council office to make enquiry.

The question for the opinion of the Court was, Whether the Plaintiffs were or were not entitled to recover? If the Court should be of opinion that the Plaintiffs were entitled to recover, the verdict for 300*l.* was to stand; but if the Court should be of opinion that the Plaintiffs were not entitled to recover, then a nonsuit was to be entered; and it was agreed the Court was to be at liberty to form the same inferences from the evidence as the jury might have done.

Spankie Serjt. for the Plaintiffs. First, the captain of the *George* was in the fair prosecution of a legal voyage at the time he was captured; and, secondly, the sentence of the foreign court, as set out in this case, is not conclusive to shew that the ship was condemned for the prosecution of an illegal voyage or breach of blockade. Although, generally speaking, a neutral who disregards the blockade of a belligerent power is liable to capture, (case of the *Neptunus* (*a*), yet, if the neutral sails from a port at a great distance from the blockading power, and with no intention of violating the blockade, the law is otherwise: as where there is reason to expect the blockade will be concluded before the ship arrives, and she sails with

(*a*) 2 *Rob.* 110.

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bonâ fide instructions to seek another port of discharge in case the blockade should be found to continue. Case of the *Shepherdess.* (*a*) In *Naylor* v. *Taylor* (*b*), a case arising out of this same blockade, Lord *Tenterden* said, "There is no ground for saying, that this voyage, as insured, was illegal in its commencement; indeed, according to the opinion of Lord *Stowell*, in the case of the *Shepherdess*, the vessel might have sailed for *Buenos Ayres* without contravening the law of nations, provided it was a part of the original intention to enquire as to the continuance of the blockade at some port of the blockading country; and in this case enquiry might have been made at *Monte Video*, or of any of the *Brazilian* ships met in the river *Plate*; and the policy is framed upon a doubt whether the blockade would continue at the time of the ship's arrival in the *Plate*, and does not indicate any intention to violate the blockade."

There is no ground for alleging a deviation. The wind was adverse to the captain's making enquiry at *Monte Video*, and in the spirit of his instructions he brought up as soon as the *Brazilian* squadron appeared in sight, instead of endeavouring to escape, as he would have done, if there had been any intention to violate the blockade. No other motive can be imputed to him but barratry; for which there is no ground, but which would entitle the Plaintiffs to recover.

Then, the sentence of the foreign court of admiralty will not assist the Defendant.

Such a sentence is not conclusive as to the ground of condemnation, unless it be plainly and explicitly expressed. Where the ground of condemnation is ambiguous, or only to be collected by inference, the sentence is evidence only of the existence of the decision, and of the facts stated in it, but not of the ground

(*a*) 5 *Rob.* 262, 3, 4. (*b*) 9 *B.* & *C.* 723.

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of condemnation. *Hughes* v. *Cornelius* (*a*), *Bernardi* v. *Motteux* (*b*), *Lothian* v. *Henderson* (*c*), *Bolton* v. *Gladstone* (*d*), *Calvert* v. *Bovill* (*e*), *Fisher* v. *Ogle*. (*g*) It is nowhere stated, in this sentence, that the condemnation was for breach of blockade; and the facts disclosed do not warrant the sentence on any other ground, for the voyage itself was not in contravention of the law of nations. In *Everth* v. *Hannam* (*h*), the breach of blockade was expressly found. No breach of blockade being expressly stated here, the presumption is that the ship was condemned as enemies' property; *Saloucci* v. *Woodmass* (*i*); a ground of condemnation which could not be supported.

Jones Serjt. *contrà*. Breach of blockade is sufficiently apparent upon this sentence as the ground of condemnation; at all events, breach of blockade and illegality of destination is disclosed by the facts found in the cause sufficiently to avoid the policy; and the captain was also guilty of a deviation.

In *Hughes* v. *Cornelius*, *Bernardi* v. *Motteux*, *Barzillay* v. *Lewis* (*k*), and other cases, in which the sentence has been deemed not conclusive, there was an entire absence of any assignable ground for the condemnation. But in *Calvert* v. *Bovill*, *Lawrence* J. said — "If we can collect from the sentence itself on what ground the foreign court decided, that is conclusive in any action brought in this country; but if it be ambiguous, or does not appear on the face of the sentence on what ground they proceeded, then we may receive evidence to shew what were the grounds of the decision abroad." It may fairly be collected from this sentence, that the ground of

(*a*) 2 *Show.* 232.
(*b*) *Dougl.* 575.
(*c*) 3 *B.* & *P.* 499.
(*d*) 5 *East*, 155.
(*e*) 7 *T. R.* 523.
(*g*) 1 *Campb.* 417.
(*h*) 6 *Taunt.* 375.
(*i*) *Park on Ins.* 362.
(*k*) *Ibid.* 359.

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condemnation was the breach of blockade; for it commences by stating, that "as the ship sailed from *Liverpool*, and was bound to *Buenos Ayres*, knowing of the blockade, she ought to be considered as violating the blockade," and no other ground of condemnation is assigned.

But the captain was guilty of a deviation in not calling to enquire at *Monte Video* pursuant to his instructions. That was the regular course of his voyage; for the enquiry as to the continuance of the blockade could only be made at the port of the blockading power. Case of the *Shepherdess*, *Spes*, and *Irene*. (*a*) A blockade would be fruitless if ships might enquire at the ports of the power blockaded. The attempt to violate the blockade, however, was not barratry, which can only be *ex maleficio*. Case of *Adonis* (*b*), *Everth* v. *Hannam*. (*c*)

Spankie. The captain was to enquire wherever he could, and not exclusively at *Monte Video*. His coming to an anchor for that purpose, on seeing the *Brazilian* squadron, was a sufficient discharge of his duty. The decision in *Calvert* v. *Bovill* establishes, that the *English* court will not draw its conclusion, as to the ground of condemnation, from the mere facts stated in the foreign sentence. The conclusion must be drawn by the foreign court: it is only from the conclusion drawn there that the *English* court will collect the ground of the sentence.

Cur. adv. vult.

TINDAL C. J. The principal question in this case is, Whether the sentence of condemnation of the brig *George*, and her cargo, in the prize court at *Monte Video*, dated the 19th day of *December* 1826, is to be

(*a*) 5 *Rob.* 76. (*b*) 5 *Rob.* 256. (*c*) 6 *Taunt.* 375.

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received in our courts as conclusive evidence of the fact that the ship was captured in attempting to break the blockade of *Buenos Ayres*. For if that is to be taken as a fact conclusively proved, then the Plaintiffs in this action are in no condition to recover; not upon the count for capture and detention, because such capture was occasioned by the voluntary act of the master, in violation of the law of nations; nor upon the count for barratry, because it appears upon the whole evidence that the master, supposing him to have broken the blockade, acted honestly and *bonâ fide*; his conduct being attributable rather to ignorance or want of caution than to such fraudulent design as is necessary to constitute the crime of barratry.

The general law upon this subject is well known, that the sentence of a foreign court of admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears on the face of the sentence free from doubt and ambiguity.

But it is at the same time as well established, that in order to conclude the parties from contesting the ground of condemnation in an *English* court of law, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty, whether the ship was condemned upon one ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country. The cases of *Fisher* v. *Ogle* (*a*), and *Calvert* v. *Bovill* (*b*), are express authorities to this point, and the sentence of condemnation in the latter case bears a strong resemblance to that in the present. There Lord *Kenyon* C. J. says, "If, indeed,

(*a*) 1 *Campb. N. P.* 417. (*b*) 7 *T. R.* 523.

deed, that court had stated in their sentence that they condemned the goods because they were *British* property, I should have considered myself bound by that sentence; but they have assigned other reasons for their adjudication; the express grounds of the sentence of adjudication are, that the ship was destined for one of the *West India* islands; that she was hired and loaded at *London*, and had a certain quantity of gunpowder on board; therefore they condemned her and her cargo as a good prize." The sentence in that case was, "Forasmuch as the true destination of the said vessel was for the *English* islands, having been hired and loaded in *London*, and that there has been found on board her eighty barrels of gunpowder, the Court declares the said brig to be a good prize to the captors."

Now looking at the adjudicatory part of this sentence, which is the important part for the discovery of the precise ground of condemnation, it is in these terms; viz. "*From all which*, and from what the documents state, I judge the said brig *George* and her cargo to be good and lawful prize to the capturers." The words "from all which" refer us back to the premises, to discover the grounds of the sentence; and in those premises we find enumerated three distinct statements; first, "that it plainly appears from all the documents, that the brig *sailed from Liverpool knowing of the blockade*, and which the captured do not even deny, nor that her destination was *Buenos Ayres*, at a short distance from which she was taken; secondly, that for the reason last given, *she ought to be considered as violating the blockade*; thirdly, that the ship had not even the plausible excuse of coming to *Monte Video* first, and thereby complying with the *published instructions*." Now, upon referring to these premises, we think we cannot safely infer that the precise ground of condemnation was the attempt to break the blockade. The first

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statement refers to the illegality of the ship's destination from *Liverpool* to *Buenos Ayres*, then being under blockade. It is impossible to say with certainty that the sentence may not have proceeded on that ground, in part, if not altogether; it is more than probable it did so; for in another part of the premises the Judge reverts to this statement in these terms, "Forasmuch as besides not doing away the proof that *Buenos Ayres* was the first port the shipment was destined for, *in itself criminal*." But if this was the ground on which the sentence proceeded, in the first place, it is no ground for condemnation by the law of nations, unless there was an intention to violate the blockade; and in the next place, the sentence leaves untouched the question of fact, whether the blockade was broken or attempted to be evaded. If it formed an ingredient in the judgment of the *Brazilian* court of admiralty, no one can say how much it weighed with them, or that if this ground of condemnation had been out of the case, the court intended to rely on the fact of the blockade broken as their ground of adjudication. Again, in the latter part of the preamble to the sentence, the Judge refers to a noncompliance with published instructions, as a charge against the master of the ship. What these instructions are does not appear; whether some regulations ordained by their own authority or not is uncertain. But if this, which is no ground of condemnation by the general law of nations (*Mayne* v. *Walter*, *Easter*, 22 *G.* 3. 2 *Park Ins.* 531.), operated on the mind of the foreign judge to condemn the ship and cargo, there is an end again to the conclusive finding of the fact, that the ship violated the blockade at *Buenos Ayres*.

Still further, the terms in which the fact of the violation of the blockade is adverted to in the preamble of the sentence are far from direct and declaratory, but afford, at most, an inference that the Judge felt himself warranted

warranted in drawing such a conclusion: "She, for this reason," says the Judge, "ought to be considered as violating the blockade, and which she would have effected but for the diligence of the captors."

Under a sentence, therefore, expressed with so much doubt and ambiguity as to the real ground on which it proceeded, we hold ourselves at liberty to determine, whether, upon the evidence given at the trial, such violation of the blockade did in fact take place or not; and upon that question, we are satisfied on the evidence that the captain did not break, nor did he intend to break, the blockade, but that he honestly intended to obtain instructions from the blockading squadron, not having been before warned off by any of the *Brazilian* cruisers.

The only remaining objection that has been insisted on against the Plaintiffs' right to recover is, that the voyage in question was an illegal voyage in its commencement, because the ship was destined to a port which was notified to be under blockade. But that this was not an illegal voyage, was determined by the Court of King's Bench (*a*), upon a voyage described in the policy in the very same terms as the present, and under circumstances so precisely similar, that it is unnecessary for us to say more, than that we entirely concur with the judgment there given, founded, as it is, upon the authority of Lord *Stowell*'s judgment in the case of the *Shepherdess*. (*b*)

We therefore think the verdict should stand, and that judgment should be entered for the Plaintiffs.

Judgment for Plaintiffs.

(*a*) See *Naylor* v. *Taylor*, 9 *B. & C.* 718.

(*b*) 5 *Rob. Adm. Rep.* 262.

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BROWNE *v.* CARR and Others.

A surety for a bankrupt is not discharged by the creditor's signing the bankrupt's certificate, even after notice from the surety not to do so,

BY order of the Master of the Rolls, the following case was submitted for the opinion of the Court:—

The Plaintiff went under an engagement of guaranty or suretyship to the Defendants, who were dealers in silk, and carried on business in copartnership, for one *James Thomas Barber*, their customer, and delivered to them a note in writing, signed by himself, addressed to the Defendants, to the effect following; — "In consideration of your giving *James Thomas Barber* a current credit for silk from this date, I hereby undertake, in consideration of such, to make good any deficiency or loss you may sustain, not exceeding 400*l.*"

The Defendants afterwards supplied silk to the said *J. T. Barber*, in the way of his trade, to the amount of 400*l.* and upwards, upon the credit of the said guaranty. *J. T. Barber* afterwards became insolvent, and made default in his engagements to the Defendants, including the said sum of 400*l.* for silk supplied upon the credit of the said guaranty.

The Defendants, in consequence of such default, called upon the Plaintiff for payment of 400*l.* under the guaranty. The Plaintiff, in the course of communications with the Defendants in reference to their demand, wrote and sent to them (amongst others) the letters following; that is to say, a letter of the 16th *February* 1826, which contained the following passages: — "I have just received the enclosed from Mr. *Barber*, who seems to wish it to be believed that he has not one penny left, or done any thing fraudulent, and that he intends taking the benefit of the insolvent act. I conclude

clude he is arrested at your suit; if not, perhaps you can tell me at whose it is, as otherwise I suspect it is a made up arrest. If he is declared a bankrupt, I imagine he cannot take the advantage he wishes. Be pleased to inform me, by return of post, what is best to be done. I find I cannot make him one myself, because I have not as yet paid any of my acceptances. I hope that you, gentlemen, who understand these things, will take the business on yourselves, by which alone the utmost will be obtained, as I really do not like my name to couple with such a rogue as he is. I hope to hear from you in reply.—P. S. Should *Barber* have made any arrangement to get released through the insolvent act, pray put a stop to it."

A letter of the 9th *April* 1826 contained the following passage:—"I have a notice that Mr. *Barber* means to take the benefit of the insolvent act. I conclude in his schedule he has named you as a principal creditor, which no doubt he has done; I therefore trust you will take steps to oppose him for the full amount of 400*l.* I am his guarantee to you for; especially so as you are aware of the disposal of his property in the way he did to the several houses you traced it to."

In answer to which last-mentioned letter the Defendants wrote a letter to the Plaintiff, dated 10th of *April* 1826, to the following effect;—"We have a sight of *Barber*'s schedule. He appears to have no effects for his creditors; and from past experience, it is useless opposing him in this court. We hope you will take the earliest opportunity of remitting us on account of your guaranty."

A commission of bankrupt, bearing date the 18th *April* 1826, was issued against the said *J. T. Barber*, under which he was found and declared a bankrupt, and the usual proceedings were taken.

On the 3d *June* 1826 the Defendants proved under the

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the commission the sum of 597*l.* 9*s.* 7*d.* as a debt due to them by the said *J. T. Barber*, which comprehended the sum of 400*l.* for silk supplied to him, and covered by the said guaranty of the Plaintiff.

On the 3d *June*, the day appointed for the bankrupt to pass his last examination under the commission, the Defendant *John Carr* was present and heard the examination of the said *J. T. Barber*, which then took place; when, by reason of the unsatisfactory nature of the accounts given by him of his estate and effects, the examination was adjourned by the commissioners to the 20th of the same month, of which *John Carr* was well aware. On that day the bankrupt attended the commissioners for the purpose of passing his last examination; but, after his undergoing an examination, the commissioners again refused to pass his last examination, and adjourned the same *sine die*, at the same time severely reprimanding the bankrupt. The bankrupt afterwards procured another meeting of the commissioners to be duly held on the 29th *July* following; on which day the commissioners, after severely reprimanding him for the dishonesty of his conduct, passed his last examination.

On the same day (29th *July*), and immediately after the bankrupt had so passed his last examination, the Plaintiff's solicitor went to the counting-house of the Defendants, and then and there told *Robert Dodgson*, one of the Defendants, that if they persisted in holding the Plaintiff liable upon the before-mentioned guaranty they should *not* sign the certificate of the said bankrupt; and, on the part of the Plaintiff, gave notice to the said *Robert Dodgson* not to sign such certificate; when *Robert Dodgson* said he did not care for the Plaintiff or the said solicitor; and that he should sign such certificate notwithstanding his notice; or used words to that effect. As the solicitor was leaving the counting-house, the bankrupt

bankrupt came in, at which time the Defendant *Robert Dodgson* signed the bankrupt's certificate of conformity; and such certificate was a few days afterwards signed again by the Defendant *William Bell.*

Besides the said debt of the Defendants of 597*l.* 9*s.* 7*d.*, the following were also proved against the bankrupt under the commission, viz. 180*l.* 18*s.*, 4*l.* 6*s.* 8*d.*, 51*l.* 5*s.*

All the creditors, with the exception of the creditor for the sum of 4*l.* 6*s.* 8*d.*, signed the bankrupt's certificate of conformity; and the same was afterwards duly signed by the major part of the commissioners, and allowed by the Lord Chancellor.

The question for the opinion of the Court was,

Whether the Defendants, having, under the circumstances of this case, signed the certificate of *J. T. Barber*, who had become a bankrupt, the Plaintiff, the surety for the said *J. T. Barber* to the Defendants, became discharged thereby from the claims of the Defendants in respect of such suretyship?

Spankie Serjt. for the Plaintiff. It is an acknowledged principle, that whenever the creditor so conducts himself towards his debtor, as to impair the rights of the surety against the debtor, the surety is discharged. *Rees* v. *Berrington*, cited in *Ex parte Gifford* (*a*), *Mayhew* v. *Crickett* (*b*), *Law* v. *E. I. Company.* (*c*) The bankrupt's certificate operates as a discharge of the bankrupt; that certificate can only be obtained by the signature of the creditor; the creditor, therefore, by signing it, relinquishes an advantage against the debtor, of which the surety might have availed himself. And the signing the certificate is an act which the creditor

(*a*) 2 *Ves.* jun. 544.
(*b*) 2 *Swanst.* 185.
(*c*) 4 *Ves.* jun. 824.

cannot

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cannot be compelled to perform, so that by such act he voluntarily violates the implied contract between himself and the surety; which contract is, that the surety shall, if called on, pay the debt due to the creditor, and that the creditor shall, in return, impart to the surety every means which the creditor may possess himself of enforcing his demand against the debtor.

In *Bulteel* v. *Jarrold* (*a*) and *Langdale* v. *Parry* (*b*) the point was discussed, but not decided; and though in the latter case the Court said, "It would be too much to say that a bankrupt, who conducts himself well, is to be deprived of all chance of obtaining his certificate, and reinstating himself in business during so long a time, merely for the sake of a man who has become his surety," the determination of that point was not the question in the cause.

The decision by Lord *Eldon* between these parties (*c*) does not necessarily involve the present question; and whatever might have been his Lordship's opinion upon that occasion, he appears to have taken a different view of the matter in *Ex parte Taylor* (*d*), where it was held, that a party who had proved a debt, and afterwards assigned it, could not sign the certificate without the authority of the assignee.

The judgment in *Ex parte Herbert* (*e*), which seems to be adverse to the Plaintiff, proceeded on the very special ground, that the debt having been assigned subsequently to the bankruptcy, the assignee was not to be considered in the matter of the certificate. In *Ex parte Smith* (*g*) it was held that where the indorser of a bill of exchange becomes bankrupt, and the holder proves the amount of his bill under his commission, and afterwards compounds with, and discharges the acceptor without

(*a*) 8 *Price*, 467.
(*b*) 2 *D. & R.* 337.
(*c*) 2 *Russ.* 600.
(*d*) 1 *Glynn & J.* 399.
(*e*) 2 *Glynn & J.* 66.
(*g*) 3 *Br. C. C.* 1.

notice

notice to the assignees of the indorser, he thereby also discharges the indorser's estate, and the proof of his debt must be expunged.

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Jones Serjt. *contrà*. Where the bankrupt has conducted himself properly, it is an imperative duty in the creditor to sign his certificate; and an act done under a species of moral compulsion is plainly distinguishable from a purely voluntary act, by which the creditor impairs the rights of the surety. If it were established that the creditor should not sign where his debt is guaranteed, a bankrupt who had a surety might never obtain his certificate.

But the signing the certificate is no injury to the surety; for the surety might have paid the debt to the creditor, and then might have stood in his place as to proof of the debt against the bankrupt. When the drawer of a bill of exchange is discharged by time having been given to the acceptor by the holder, the drawer loses the early opportunity of enforcing his claim against the acceptor; but in the present case the surety loses his claim against the bankrupt by his own laches in not paying the creditor, and then standing in his place. In 2 *Russell*, 600. Lord *Eldon* said, "As the law now stood, the surety might go in under the commission and prove; he had distinct and independent rights of his own; and if he did not choose to take the course which would enable him to assert those rights, he could not expect aid from a court of equity." And in *Ex parte Herbert* the principle contended for by the plaintiff was expressly overruled. In the case of the *Trent Navigation Company* v. *Harley*(*a*) it was held that the laches of obligees in a bond (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for

(*a*) 10 *East*, 34.

the

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the obligees), in not properly examining his accounts for eight or nine years, and not calling upon the principal for payment so soon as they might have done for sums in arrear and unaccounted for, was not an estoppel *at law* in an action against the sureties. So in *Davey* v. *Prendergrass* (*a*) it was held that it was not any defence at law to an action on a bond against a surety, that by a parol agreement time had been given to the principal.

If an action had been brought on this guaranty, the surety could have pleaded no reason for non-payment.

Spankie. He might have pleaded the facts as they have occurred, and that would have raised the question now in debate. The surety was not bound to pay the debt, but might lawfully wait to see whether the bankrupt would pay 20*s.* in the pound, or supersede his commission. By the act of the creditor in the interim, the surety's claim against the bankrupt has been defeated. In *Trent Navigation Company* v. *Harley*, and *Davey* v. *Prendergrass*, the decisions turned on the ground that the instrument executed by the surety being under seal, a court of law could not discharge him, except under an instrument of equal obligation.

Cur. adv. vult.

TINDAL C. J. Upon consideration of the question referred to us by his Honor, the Master of the Rolls, whether the signature of the certificate of *Barber* the bankrupt, by the defendants his creditors, operates in law as a discharge to the plaintiff, who is surety for *Barber*'s debt, we are of opinion that the legal liability of the surety is not thereby discharged.

The ground upon which it has been contended that

(*a*) 5 *B.* & *A.* 187

this

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this proceeding amounts to a release, is the general acknowledged principle, that wherever the creditor so deals with his debtor as to alter the rights of the surety against the debtor, the surety is discharged at law. Thus, if a man is surety for the payment of a debt at a particular day, and the creditor extends the day of payment without the consent of the surety, his liability is destroyed. And the reason is, because the remedy of the surety against the principal may become more uncertain by postponement; because he became surety for the performance of one certain duty, and not for the other, which the creditor has thought proper to substitute for it of his own authority. The instance where the holder of a bill gives time to the acceptor, without the authority of the drawer, and thereby discharges the drawer, is the most familiar; and as the consequence of signing the certificate of the debtor is to release his person from the arrest of the surety, and his future effects from execution, the damage done to the surety by the act of the creditor, that is, supposing the debt to be paid, appears sufficient to give the surety the right to complain.

In those, and in all similar cases, however, the act done by the creditor is his own act, over which the surety has no control; and the injury which the surety would receive is one which he has no mode of preventing. But in the present case, neither of those circumstances occur. The legislature has provided that the surety, if he pays the debt, may stand in the place of the creditor where the creditor has proved, or may prove the debt himself where the creditor shall not have proved under the commission. It is the duty of the surety to pay the debt, and if he declines so doing, and thereby permits the creditor to prove, the signing the certificate of conformity, which is a power given by the statute to the proving creditor, cannot be considered

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as an act done by the creditor which altered the surety's right without his control, and scarcely, indeed, without his consent. It is not an act beyond his control, for he might have paid the money in due time, and prevented the creditor from proving; and if he voluntarily lies by, and omits the only means of preventing it, he may not unreasonably be considered to have assented to the act. Besides, the signing the certificate, where the creditor is satisfied that the bankrupt has conformed to the provisions of the statute, is a moral obligation on the creditor; it is a power vested in him by the act, which he is morally bound to exercise where the truth of the case requires it. The exercise of such a power, therefore, by the creditor, where he is placed in the condition to exercise it by the laches of the surety, cannot be considered as ranging itself under those voluntary acts of the creditor which release the surety. Indeed the situation of a bankrupt, circumstanced as the present, would be very hard, if the notice given by the surety were to deprive the creditor who has proved of his right to sign the certificate. For the surety could not sign it at the time of the notice, and non constat that he would ever be able, as he may never pay the debt; so that, according to the surety's argument, the certificate could never be signed by the one or the other.

We shall certify our opinion to the above effect to his Honor.

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(IN THE EXCHEQUER CHAMBER.)

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May 7.

ASSUMPSIT on a policy of insurance on goods by the ship *Albion*, *Bolivar*, *Java Packet*, and *Blora*, all or any, at and from *Sincapore*, *Penang*, *Malacca*, and *Batavia*, all or any, to the ship's port or ports of discharge in *Great Britain*, or to any port or ports in the *United Netherlands*, or to *Altona* or *Hamburgh*, all or any, with leave to touch, stay, and trade at all or any ports and places *whatever and wheresoever* in the East Indies, *Persia, or elsewhere*, as well beyond as at and on this side of the *Cape of Good Hope*, in port or at sea, at all times and in all places, until safely arrived and landed at the ship's port or place of discharge; beginning the adventure upon the said goods from the loading thereof aboard the ship *as above*; with leave to call at or off any port or place in *Great Britain*, and wait for orders; and with liberty also *in that voyage* to proceed and sail to and touch and stay at any ports or places *whatsoever and wheresoever in any direction, and for any purpose necessary or otherwise, particularly*

Policy on goods in *Java Packet*, at and from *Sincapore*, *Penang*, *Malacca*, *Batavia*, all or any, to ship's port of discharge in *Europe*, with leave to touch, stay, and trade at all or any ports and places whatever and wheresoever in the *East Indies* or elsewhere, beginning the adventure upon the goods from the loading thereof on board, *as above*, with leave *in that voyage* to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, *in any direction*, and for any purpose, necessary or otherwise, particularly *Sincapore*, *Penang*, *Malacca*, and *Batavia*, *Cape of Good Hope* and *St. Helena*. The ship took goods on board at *Batavia*; proceeded to *Sourabaya*, which is 400 miles to the eastward of *Batavia*, and directly out of the course from *Batavia*, *Sincapore*, *Penang*, or *Malacca* to *Europe*; took goods on board at *Sourabaya*; returned to *Batavia*; and thence proceeded to *Europe*: Held, that the voyage performed was a voyage covered by the policy; that the proceeding to *Sourabaya* was no deviation; and that the goods put on board at *Sourabaya* were covered by the policy as well as those put on board at *Batavia*.

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ticularly Sincapore, Penang, Malacca, and *Batavia, Cape of Good Hope,* and *St. Helena,* with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed any deviation.

At the foot of the policy the insurance was declared to be all in the *Java Packet* on coffee. The premium was 6*l.* 6*s.* per cent. The Plaintiff below claimed as for a total loss.

The cause was tried before Lord *Tenterden* C. J., at the *London* sittings after *Hilary* term 1829, and it was agreed that the facts should be turned into a special verdict, the material parts of which are as follows: —

The policy of insurance mentioned in the declaration was effected by *John M'Allum,* as agent to *Hunter* the Plaintiff below, and was subscribed by the Defendant below for 300*l.*; the whole amount insured being 7500*l.* The interest was duly declared to the Defendant below to be all in the *Java Packet,* on coffee. The ship being at *Batavia,* coffee of the value of 923*l.* 8*s.* 6*d.* was there loaded on board her by the Plaintiff below, to be carried to *Antwerp.* From thence she proceeded, in prosecution of the adventure, to *Sourabaya,* another port in the island of *Java,* where the Plaintiff below loaded other coffee of the value of 5368*l.* 16*s.* 6*d.* to be also carried to *Antwerp,* making the whole value of the coffee loaded by the Plaintiff below 6292*l.* 5*s.* No other goods were shipped by the Plaintiff below in respect of the insurance effected by the said policy. The ship returned from *Sourabaya* to *Batavia,* with the coffee shipped at both those places, and afterwards sailed therewith from *Batavia* for *Antwerp. Sourabaya* is not in the direct course from *Batavia, Sincapore, Penang,* or *Malacca,* to *Europe,* nor in the direct course from any one to any other of those four places; but is directly out of the course from each of them to any other of them,

them, and is distant from *Batavia* 400 miles eastward. *Sincapore*, *Penang*, *Malacca*, and *Batavia* are not, according to the order in which they are mentioned in the policy, in the direct course of a voyage therefrom to *Europe*; but the direct course of a voyage from these four places to *Europe* is according to the following order: *Penang*, *Malacca*, *Sincapore*, *Batavia*. Any port or place in *Persia* is more than 1000 miles out of the course from any of the said four places to *Europe*. The ship, before her arrival at *Antwerp*, was *totally* lost, with goods, by perils of the seas.

The questions were, Whether the voyage performed was a voyage covered by the policy, or the passage to *Sourabaya* was to be deemed a deviation? and, Whether the coffee shipped at *Batavia* and *Sourabaya*, or at the latter place alone, was covered by the policy? The Court of King's Bench having decided in favour of the Plaintiff below, the cause was removed by error into the Court of Exchequer Chamber.

Maule for the Defendant below, argued, that the voyage to *Sourabaya* was a deviation; that *Sourabaya* was not a loading place within the terms of the policy; and that, consequently, the coffee put on board there was not covered by the terms of the policy. With respect to the deviation, extensive as the terms of this policy are, and unconfined as the ship is as to touching at various ports and places, her course is still restricted by the qualification in the policy, that they must be the ports or places specified, or ports and places *in that voyage*. *That voyage* was the voyage from the first place of loading, *Batavia*, to *Europe*. *Persia* is specifically mentioned, and therefore an allowable place for the ship to touch at, even though not in the direct course from *Batavia* to *Europe*; but "*any ports or places in the East Indies*" means, any ports in the *East Indies* in the

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voyage from *Batavia* to *Europe:* and *Sourabaya* is clearly out of the voyage from *Batavia, Sincapore, Penang,* or *Malacca* to *Europe.* If the permission to sail to and touch at various places in any direction be not so qualified, the captain, under pretence of touching, might have sailed to *Van Dieman's Land* or *Kamptschatka* in his alleged voyage from *Batavia* to *Europe,* and have held the insurers under liability for several years. That could not have been the intention of the parties; and the restriction to touching at ports *in the particular voyage* distinguishes this case from all those in which the liberty to touch, not having been so qualified, has received a more extended construction: as *Metcalfe* v. *Parry* (*a*), and *Mellish* v. *Andrews.* (*b*) In *Bottomley* v. *Bovill* (*c*), where a policy of insurance was effected upon ships at and from *London* to *New South Wales,* and at and from thence to all parts and places in the *East Indies* or *South America,* with liberty for the said ship *in that voyage* to proceed and sail to and touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the *Channel, Cork* in *Ireland, Madeira, Cape of Good Hope, St. Helena,* and wheresoever the ship might proceed to, as well on this as on the other sides of the *Capes of Good Hope* and *Horn,* and for all purposes whatsoever; particularly to trade and sail backwards and forwards, and forwards and backwards; it was held, that after the arrival of the ship at *New South Wales,* she was protected by the policy so long only as she was sailing on a voyage either to *South America,* or to the *East Indies,* or on some intermediate voyage, having for its ultimate object the accomplishment of a voyage either to *South America* or to the *East Indies.* And in *Hogg* v. *Horner* (*d*), where a ship was

(*a*) 4 *Campb.* 123
(*b*) 2 *M.* & *S.* 27.
(*c*) 5 *B.* & *C.* 210.
(*d*) *Park on Ins.* 298 *a.*

insured

insured "at and from *Lisbon* to a port in *England*, *with liberty to call at any one port in Portugal* for any purpose whatever," and the ship sailed from *Lisbon* to *Faro* to complete the loading; *Faro* being a port to the southward of *Lisbon*, and consequently lying directly out of the course of the voyage to *England*, Lord *Kenyon* was of opinion, that the liberty given by this policy must be restrained to a permission to call at some port to the *northward* of *Lisbon* in the course of the voyage to *England*, and that by going to the southward the assured had been guilty of a deviation.

But, secondly, *Sourabaya* was not a loading-place within this policy. Loading, *as above*, can only mean a loading at one of the four places specified as *termini à quo*. In *Violett* v. *Alnutt* (*a*), indeed, on a policy on goods at and from *Plymouth* to *Malta*, with liberty to touch at *Penzance* or any other port in the Channel to the westward, for any purpose whatever, beginning the adventure from the loading the goods on board the ship as above, it was held, that goods loaded at *Penzance* were protected by the policy; but that was decided on a motion for a new trial, the most imperfect mode of making a Court acquainted with the facts of a case, and it was a departure from the law as it stood before. In *Barclay* v. *Stirling* (*b*) the Court of King's Bench decided in favour of the assured upon a similar policy; but in that case freight, and not goods, was the subject of insurance; and the chief object of the action was to obtain for the underwriter freight earned by the ship, after an abandonment on a supposed total loss.

In *Grant* v. *Paxton* (*c*), and *Grant* v. *Delacour* (*d*) the policies were on voyages out and home, which necessarily require a greater latitude for the loading ports than a single voyage from a foreign port home.

(*a*) 3 *Taunt.* 419.
(*b*) 5 *M.* & *S.* 6.
(*c*) 1 *Taunt.* 463.
(*d*) 1 *Taunt.* 466.

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J. Evans for the Plaintiff below, was desired by the Court to confine himself to the last point; as to which he relied on *Violett* v. *Allnutt*, confirmed by *Barclay* v. *Stirling*, contending that it was immaterial whether the policy were on freight or on goods, as policies of insurance are subject to the same rules of construction as all other instruments: *Robertson* v. *French* (*a*): where Lord *Ellenborough* says (*b*), — "For instance, where the word *ship* is written in the margin of the policy, or *freight*, or *goods*, in such case the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that one. And this is done in cases where the subject meant to be insured is still more remote from ships and goods, the only subjects of insurance in the printed policy; *viz.* where the object of the insurance, as declared by the marginal memorandum, is money lent on *bottomry* or *respondentia*, or the like; the meaning of which marginal memorandum may be translated thus: — 'We mean to insure the subject so named, *freight* for instance, arising and accruing during the limits of the voyage within described, from the carriage on goods on board the ship within mentioned, against the perils within enumerated, and upon the premium herein specified: in other words, we adopt the general language of the policy as far as it may serve to effectuate this object, and no further."

Maule was heard in reply, when the Court said they had no doubt as to the judgment they should give, but would take time to look into the cases.

Cur. adv. vult.

(*a*) 4 *East*, 135. (*b*) 4 *Id.* 140.

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TINDAL C. J. In this case, in which judgment has been given for the Plaintiff in the original action, it appears to be unnecessary to recapitulate the declaration, or the facts found by the special verdict: it will be sufficient to make such reference to them as will be necessary to explain the grounds of the judgment now given by the Court.

The writ of error was brought by the Defendant below, and the objections which have been taken to the judgment of the Court of K. B., and which are relied upon in argument by the counsel for the Plaintiff in error, were in substance these three; viz. first, that the ship never sailed on the voyage described in the declaration, or, in other words, there was a misdescription of the voyage; secondly, that upon the facts stated in the special verdict, the sailing from *Batavia* to *Sourabaya* and back, was a deviation; and, thirdly, that at all events the goods shipped at *Sourabaya* are not covered by the policy.

The first objection urged is, that the voyage for which the ship was insured was a voyage from *Sincapore*, *Penang*, *Malacca*, and *Batavia*, all or any, to the ship's port of discharge in *Great Britain*, or any port in the *Netherlands*, or to *Altona* or *Hamburgh*; that the ship sailed with part of her cargo on board from *Batavia* to *Sourabaya*, a port 400 miles to the eastward, where she loaded other part of her cargo, returned to *Batavia*, and thence set sail to *Antwerp*; that this was not the voyage insured; and that the ship sailing on a different voyage from that described in the policy, the underwriters are altogether discharged.

In order to ascertain the validity of this objection, it will be necessary to advert to the terms in which the voyage itself is described in the policy, and the leaves or licenses for which the assured has stipulated; and also

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to advert to those facts stated in the special verdict, which bear upon this part of the question.

Now the voyage is described in the policy "at and from *Sincapore*, *Penang*, *Malacca*, and *Batavia*, all or any, to the ship's port or ports of discharge in *Great Britain*, or to any port or ports in the united *Netherlands*, or to *Altona* or *Hamburgh*, all or any, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever, in the *East Indies*, *Persia*, or elsewhere, as well beyond as at and on this side of the Cape of *Good Hope*, in port or at sea, at all times and in all places, and until safely arrived and landed at the ship's final port or place of discharge."

The adventure is then declared by the policy to be on goods "in the good ship or vessel called the *Albion*, *Bolivar*, *Java Packet*, and *Flora*, all or any;" and the commencement of the adventure is then stated to be "upon the said goods and merchandises from the loading thereof on board the said ships as above."

After this is inserted, a second or further clause of leave or license, in these terms: — "And it should be lawful for the said ship, &c. in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, in any direction, and for any purpose, necessary or otherwise, particularly *Sincapore*, *Penang*, *Malacca*, *Batavia*, the *Cape of Good Hope*, and *St. Helena*, with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed any deviation from, and without prejudice to, the assurance."

This policy was afterwards declared to be "all in the *Java Packet* on coffee."

Now, looking at the terms in which the policy is effected, and construing it in the plain, ordinary, and popular sense in which these terms are to be understood,

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stood, there being no peculiar sense, so far as we are aware, which the words have acquired distinct from their popular sense, we think the voyage in question is a voyage intended by the parties to be, and is in fact covered by, the description of the voyage contained in the policy.

The voyage performed by the ship is described in the special verdict thus: — "That the ship being at *Batavia*, a certain quantity of coffee, of the value, &c., was there loaded in and on board the said ship or vessel by the assured, with the intention that the said coffee should be carried in the said ship to *Antwerp*; that *Batavia* is a port in the island of *Java*, one of the islands in the *East Indies*; and that the said ship having taken in the said coffee at *Batavia*, in the prosecution of the adventure, proceeded from thence, with the same coffee on board her, to *Sourabaya*, which is another port in the island of *Java*; that the assured there loaded a certain other quantity of coffee, of the value, &c. on board the said ship, with the intention that the same should be carried in the said ship to *Antwerp* aforesaid."

The special verdict afterwards states, — "That the said ship, in the course of the adventure, returned from the said port of *Sourabaya* to the said port of *Batavia*, with the said coffee so shipped on board her at *Batavia* and at *Sourabaya* aforesaid; that the said ship afterwards sailed therewith from the port of *Batavia* for *Antwerp* aforesaid; and that *Sourabaya*, to which place the said ship proceeded from *Batavia*, and where she took in coffee as aforesaid, is not in the direct course from *Batavia*, *Sincapore*, *Penang*, or *Malacca* to *Europe*, nor in the direct course from any one of those four places — *Sincapore*, *Penang*, *Malacca*, or *Batavia*, — to any other of those four places; but the said port of *Sourabaya* is directly out of the course from each of the said four places to *Europe*, and from each of the said four places

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to any other of them, and is distant from *Batavia* four hundred miles eastward; that *Sincapore*, *Penang*, *Malacca*, and *Batavia* are not, according to the order in which the said four places are mentioned in the policy, in the said course of a voyage therefrom to *Europe*; but that the direct course of a voyage from the said four places to *Europe* is according to the following order, viz. *Penang*, *Malacca*, *Sincapore*, *Batavia*, and that any port or place in *Persia* is more than 1000 miles out of the course from any of the said four places to *Europe*."

The underwriter contends that when the ship sailed from *Batavia*, after the risk had commenced, to *Sourabaya*, to take in a further cargo, and then sailed back to *Batavia*, she sailed on a voyage not within the policy, or within either of the leaves or licenses contained therein.

But, independent of the large and general words used in the description of the voyage, and the very extended powers given by the policy, the situation of the assured, and the circumstances under which it was effected, as they must be inferred from the policy itself, make it probable that a contract of the most open and comprehensive kind was intended to be effected. This was an insurance on goods, not on ships: at the time the policy was effected the assured was uncertain from what port or ports of the *East Indies* or *Persia* his cargo would be shipped by his agents; whether all at one place, or part at one and part at another. He was further uncertain by what ship or ships, out of four which are named in the policy, his cargo would be carried; from what port or ports, out of four that are enumerated, such ship or ships would sail. He could neither foresee into what ports or places, nor for what purposes, the owners of the ships might send them; nor could he control such directions; and therefore he frames a description of the voyage in such comprehensive terms as may comprise a loading of the cargo either

either at one port or at various ports and places in the *East Indies*; and powers and licenses are also inserted in the policy so as to meet almost every possible contingency of the destination or employment of the ship, without endangering his right to recover for a loss upon the goods, either on the ground of misdescription of the voyage, or of any deviation. And, looking at the policy with this view, we think the words of the policy are large enough to carry such intention into effect, and that the sailing from *Batavia* with part of the cargo to *Sourabaya*, and taking in other part of the cargo there, and then returning from *Sourabaya*, by the way of *Batavia*, to *Europe*, was a voyage within the contemplation of, and protected by, the policy.

It is argued on the part of the underwriter, that if the clause first inserted is taken alone, the meaning of the words "touch, stay, and trade at all or any ports whatsoever in the *East Indies*," can only mean such ports and places as the ship may touch at in the usual course of a voyage from one or other of the four enumerated places to *Europe*; that the leave to stay and trade implies that the ship is lawfully at the place where such trading and staying is to take place; that is, some port or place in the course of the voyage.

But that this cannot be the meaning of the present policy appears clear from the remainder of the clause, viz. "Any ports or places whatsoever in the *East Indies*, *Persia*, or elsewhere." Now as the special verdict has found expressly that any port or place in *Persia* is more than 1000 miles out of the course from any of the said places to *Europe*, it follows that the trading cannot be intended to be confined to such ports or places only as the ship touches at in the course of such a voyage. In the same manner as in the case of *Metcalfe* v. *Parry*, where the clause was, "with liberty to call at all or any of the *West India* islands, *Jamaica* included," it was held that

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that the insertion of *Jamaica*, which was 500 miles out of the usual course, shewed the intention to be that the ship might stop at any of the islands, though out of the course of the usual voyage.

Again, taking up the question on the second clause of license, the words used are, taken altogether, of a meaning equally general with those in the first, viz. "it should be lawful for the said ship in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, *in any direction, or for any purpose.*" It is contended that the generality of this license is restrained by the words "*in that voyage;*" but, upon that construction, what sense can be given to the words, "*in any direction?*" words that are irreconcilable with touching for the purpose of trade in the onward course of the voyage only. And the insertion of those words in the policy distinguish the case from that of *Hogg* v. *Horner*, which was cited on the part of the Plaintiff in error.

Upon the whole, therefore, we think the shipping part of the cargo at *Batavia*, and thence proceeding to *Sourabaya*, and shipping other part of the cargo there, and thence sailing back to *Batavia*, and thence with the cargo to *Antwerp*, was a trading voyage from *Batavia* to *Antwerp* by the way of *Sourabaya*, within the intention of the parties as expressed in the policy, and the two several clauses of license contained therein.

Having, therefore, fully considered this the first objection, it becomes scarcely necessary to do more than to advert to the two which remain. For if the sailing from *Batavia* to *Sourabaya*, and back to *Batavia*, and thence to *Europe*, is a voyage described in the policy, it follows immediately that it cannot be treated as a deviation. Indeed, as one of the places to which the ship might go upon the voyage is a port in *Persia*, and as the special verdict does not find that *Sourabaya* is out of the

the course to *Persia*, we should be justified, upon this more restrained ground, in not considering this as a deviation from the voyage insured.

As to the third point, that the goods loaded at *Sourabaya* are not covered by the policy, the question is, whether *Sourabaya* is a loading port within the meaning of the policy? Besides referring to the opinion we have already expressed on the first objection which also involves this question, we think the two cases of *Violett* v. *Allnutt* and *Barclay* v. *Stirling* go the full length of establishing that, under the usual clause in a policy, "with liberty to touch at a port for any purpose whatever," is included a liberty to touch for the purpose of taking on board part of the cargo covered by the policy, after the policy had attached on part taken in at the loading port; and in this case the leave is not confined to touching and staying, but extends expressly to taking on board, discharging, reloading, and exchanging goods.

Upon the whole, therefore, we think the Plaintiff below entitled to recover the loss upon the whole of the cargo, both that loaded at *Batavia*, and that loaded at *Sourabaya*; and, therefore, that the judgment given by the Court of B. R. should be affirmed.

Judgment affirmed.

(IN THE EXCHEQUER CHAMBER.)

May 7. SOLARTE and Others *v.* PALMER and Another.

Where the holder of a bill of exchange seeks to recover against the indorser on default of the acceptor, the notice given to the indorser should state, expressly, or by necessary implication, that the bill has been dishonoured:

It is not sufficient to say that the holder looks to the indorser for payment.

THE Plaintiffs, as assignees of *J. R. Alzedo*, a bankrupt, declared on a bill of exchange drawn by *Joseph Keats* the 25th of *April* 1825, upon and accepted by *Jones* and Co., for the sum of 683*l.*, payable at *Williams, Burgess*, and Co.'s, eight months after date; by *Keats* indorsed to the Defendants, and by the Defendants to *Alzedo*. Averment of the acceptor's refusal to pay, and of notice thereof to the Defendants.

Plea, the general issue.

At the trial before Lord *Tenterden* C. J., the drawing, acceptance, and indorsement of the bill, the bankruptcy of *Alzedo*, and appointment of the Plaintiffs as his assignees being admitted, the Plaintiffs proved that the bill was duly presented for payment on the 15th of *December* 1825, the day on which it became payable; that payment was refused, and that the bill was returned to the Plaintiffs for nonpayment on the 16th; that the Plaintiffs, on the 17th caused to be written by Messrs. *J.* and *S. Pearce*, the attorneys at law for and on behalf of the Plaintiffs, the following letter to the Defendants: — "17th *Dec.* 1825. Gentlemen, — A bill for 683*l.*, drawn by Mr. *Joseph Keats* upon Messrs. *Daniel Jones* and Co., and bearing your indorsement, has been put into our hands by the assignees of Mr. *J. R. Alzedo*, with directions to take legal measures for the recovery thereof, unless immediately paid to, Gentlemen, yours, &c. *J.* and *S. Pearce*." Addressed, "Messrs. *Palmer* and *Bouch*;" which letter was on the said 17th of *December*,

cember, by the directions and on the behalf of the Plaintiffs, sent to and received by the Defendants. "And the said Chief Justice did then and there declare and deliver his opinion to the jury, that the letter was not a sufficient notice of the dishonour and nonpayment of the said bill of exchange to entitle the said Plaintiffs to maintain and support the said action against the Defendants; and that upon the evidence the jury ought to find a verdict for the Defendants; and with that direction left the same to the jury. Whereupon the counsel for the Plaintiffs did then and there except to the aforesaid opinion of the Chief Justice, and insisted that the Plaintiffs were then and there entitled to the verdict of the jury in favour of them the Plaintiffs as to the counts upon the said bill of exchange; and that the Chief Justice ought then and there to have declared the same to the jury; and the counsel did then and there except to the want of such declaration and direction, but the jury, acting upon the opinion of the Chief Justice, then and there gave their verdict for the Defendants. And inasmuch as the several matters so proved and given in evidence on the part of the Plaintiffs, and the opinion of the Chief Justice so as aforesaid declared and delivered to the said jury, do not appear by the record of the verdict, the said counsel for the Plaintiffs did then and there propose the aforesaid exception to the opinion of the Chief Justice, and request the said Chief Justice to put his seal to that bill of exceptions, containing the several matters so proved and given in evidence, and the said opinion so by the Chief Justice declared and delivered as aforesaid, according to the form of the statute in such case made and provided," &c.

Judgment having been given for the Plaintiff in the court below, the cause was now heard on error.

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R. V. Richards for the Plaintiffs. The notice was sufficient to apprise the Defendants that they were looked to for payment, and that is all that can be required. It would be attended with the worst consequences to hold that a notice should be couched in the precise and formal language of a declaration, and some inconvenience has arisen from the doctrine of *Ashhurst* J., that "notice means something more than knowledge." *Tindal* v. *Brown.* (*a*) But in the same case *Buller* J. says, "Though there is no prescribed form of this kind of notice, yet it must import that the holder considers the indorser as liable, and expects payment from him, that he may have his remedy over by an early application. Then it becomes his business to take up the note."

No one can doubt that upon this notice the holder has sufficiently shewn he considers the indorser liable, and expects payment from him. *Buller* J. indeed, says, "A case might easily be put, where the indorser might have notice from the holder, and yet would not be liable; as if in the present case the holder had written a letter to the indorser, containing the circumstances which have been given in evidence, the indorser would have been discharged, because it would have amounted only to this — 'The note made by *Donaldson*, and indorsed by you, is not paid, and I have given credit to *Donaldson* till to-morrow.'" And that explains what is meant by the expression, "notice means something more than knowledge." The language of *Buller* J. is adopted in *Bayley on Bills.*

Whateley, contrà, contended, that the notice should at least import that the bill had been dishonoured, for the holder might perchance demand payment when he had no right to do so. He referred to *Marius*, 21.

(*a*) 1 *T. R.* 169.

and

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and *Beawes*, 571, 2., and relied on *Hartley* v. *Case* (*a*), where it was held, that a notice of the dishonour of a bill of exchange must contain an intimation that payment of the bill has been refused by the acceptor; and that, therefore, a letter merely containing a demand of payment was not a sufficient notice. That case referred to in the recent edition of *Bayley on Bills*.

R. V. Richards. In *Hartley* v. *Case* the notice was insufficient, because the drawer and acceptor both bore the same name, and the notice did not state with precision the particulars of the bill.

Cur. adv. vult.

TINDAL C. J. The question in this case is, Whether the direction of Lord *Tenterden* to the jury, "That the letter given in evidence at the trial, and set out upon the bill of exceptions, was not sufficient notice of the dishonour and nonpayment of the bill, and that upon such evidence the jury ought to find a verdict for the Defendants," was a proper direction or not? And we are of opinion that the direction was proper, and that the judgment which has been given for the Defendants must be affirmed.

The notice of dishonour, which is commonly substituted in this country in the place of a formal protest, such formal protest being essential in other countries to enable the Plaintiff to recover (*b*), most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted. But it should at least inform the party to whom it is addressed, either in express terms or by necessary

(*a*) 4 *B.* & *C.* 339.

(*b*) *Potbier, Traité du Contrat de Change*, part 1. cap. 5. s. 2. art. 1. s. 5.

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implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount.

The allegation in the declaration is, that the bill has been presented to the acceptor, who has refused payment, whereof the Defendant has had notice; and, consequently, to satisfy this allegation, though no express form of words is necessary, the notice should convey an intimation to the party to whom it is addressed, that the bill is in fact dishonoured. Now looking at this notice, we think no such intimation is conveyed in terms, or is to be necessarily inferred from its contents.

Besides, it is perfectly consistent with this notice that the bill has never been presented at all, and that the Plaintiff means to rely upon some legal excuse for the non-presentment. The present case is stronger against the sufficiency of the notice than that of *Hartley* v. *Case*, where there was at least an allegation that the bill *had become due*, which is not found here. This letter may not improbably have been written with a different intent than that of giving notice of the dishonour to the indorser, and may have been information that an action was about to be brought by the attorney, taking for granted that the notice of the bill's dishonour had been given in the ordinary way before the bill was put into his hands for the purpose of suing thereon. At all events, however intended, it appears to us not to amount to such notice. We think, therefore, the judgment ought to be affirmed.

Judgment affirmed.

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BENNETT *v.* LOWE.

April 20.

BY order of the Master of the Rolls the following case was submitted for the opinion of this Court:—

Dorothy Axford, late of *Wood Street*, *Cheapside*, in the city of *London* deceased, being seised in fee of certain freehold estates, duly made and published her last will and testament, bearing date the 12th of *October* 1770, and which was executed and attested as by law was required for passing freehold estates by devise, and by such will the said *Dorothy Axford*, after bequeathing many pecuniary legacies, devised and bequeathed four messuages in *Wood Street* aforesaid, and two other messuages in *Great St. Helens*, to *George Lowe*, his heirs and assigns, to and for the several uses, intents, and purposes thereinafter limited, expressed, and declared of and concerning the same; that is to say, "in trust that he the said *George Lowe*, his heirs and assigns, do and shall by and out of the rents, issues, and profits out of the said premises, pay, or cause to be paid, unto *Alexander Croker*, son of *Isaac Croker*, of *Lambeth*, in case he shall be living at the time of my death, the sum of 10*l.* to buy mourning; and also the further sum of 1*l.* and 1*s.* of lawful money of *Great Britain*, weekly, and every week during his natural life; and also in trust that he the said *George Lowe*, his heirs and assigns, do and shall by and out of the rents, issues, and profits of the said premises, pay or cause to be paid unto *Mary Smith*, for and during the term of her natural life, one annuity or yearly sum of 10*l.* of lawful money of *Great Britain*, by equal quarterly payments: (annuities of 10*l.* a year were then charged on the premises in favour of *Charlotte Sibbells*,

Devise to *D.*, *L.*, *V.*, and *S.* (females), and in case any of them die, leaving a daughter or daughters, her share to go to such daughters in seniority; but if any of them, *D.*, *L.*, *V.*, and *S.*, should die without issue in the lifetime of *M. C. A.* and *W.*, the share of her and them so dying to go to *F.* and others in succession: all the rest and residue of the devisor's estates to go to *D.*:

Held, that *D.*, *L.*, *V.*, and *S.*, and their daughters, took estates for life, and *D.* a remainder in fee in the whole.

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Ann Spence, *Susannah West*, *Mary Hargrave*, and *Mary Manley*; and) for *Mary Gibson* 5*l.* 5*s.* a year; in consideration whereof I do expect and desire that the said *Mary Gibson* do take care of the cats belonging to me at the time of my decease; and from and immediately after the decease of them the said *Alexander Croker*, *Mary Smith*, *Charlotte Sibbells*, *Ann Spence*, *Susannah West*, *Mary Hargrave*, *Mary Gibson* and *Mary Manly*, then in trust, that he the said *George Lowe*, his heirs and assigns, do and shall pay and apply, and dispose of the rents, issues, and profits of the said messuages or tenements and premises, unto and equally amongst my god-daughter *Ann Mary Darwin*, *Mary Lowe*, daughter of the said *George Lowe*, *Mary Voss*, daughter of *Mary Voss*, and *Jane Spence*, daughter of the before-named Mrs. *Spence*; and I do hereby declare that the said several devises and bequests hereinbefore by me made to and to the use of the said *Ann Mary Darwin*, *Mary Lowe*, *Mary Voss*, and *Jane Spence*, respectively, are and shall be to and for her and their own sole and separate use and benefit, and in no ways liable to the debts, contracts, intermeddling or engagements of her or their present or any future husband or husbands she or they may hereafter happen to marry; and that her or their receipt and receipts alone, under her or their hands respectively, without her husband, notwithstanding her present or any future coverture, or whether she or they be sole or married, for any sum or sums of money due or payable to her under or in virtue of this my will, shall from time to time be good and sufficient discharges to the person or persons paying the same; and in case any of them the said *Ann Mary Darwin*, *Mary Lowe*, *Mary Voss*, and *Mary Spence*, shall happen to depart this life, leaving a daughter or daughters, that then the share or interest of her or them so dying, shall go to such daughters as they shall be in seniority

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seniority of age and priority of birth, the eldest of such daughters to be preferred and take before the younger. Provided always, that in case any of them the said *Ann Mary Darwin*, *Mary Lowe*, *Mary Voss* and *Jane Spence*, shall happen to depart this life without issue in the lifetime of the said *Mary Smith*, *Charlotte Sibbells*, *Ann Spence*, *Susannah West*, *Mary Hargrave*, and *Mary Gibson*, then I order that the share or interest of her and them so dying, be paid, applied, and disposed of to and to the use of *Mary Winsley*, daughter of Mrs. *Fontain*, *Mary Cherrington*, daughter of *John Cherrington*, *Susannah Speck*, daughter of *William* and *Mary Speck*, *Mary Groves*, daughter of *Richard Groves* of *Wood Street*, watchmaker, and *Diana Fierce*, daughter of *John* and *Diana Fierce*, in succession one after another, as they the said *Ann Mary Darwin*, *Mary Voss*, and *Jane Spence* shall happen to depart this life. And as for and concerning all the rest, residue, and remainder of my estates, of what nature or kind whatsoever, I give, devise, and bequeath the same unto my goddaughter *Ann Mary Darwin*. And it is my will and mind that my several messuages or tenements be let out on leases at the end of the several terms already granted, in manner they have hitherto been done by me. And I do hereby nominate and appoint the said *George Lowe* executor of this my will. Provided always, that in case the said *George Lowe* shall happen to die in my lifetime, then I do hereby revoke, annul, and make void the several devises and bequests before by me given and devised to him the said *George Lowe*, his heirs and assigns, and declare that the said *William Speck* and *Richard Groves*, and the survivor of them, and the heirs and assigns of such survivors do and shall stand seised and possessed of the several messuages or tenements and premises to hold to them their heirs and assigns, upon the trusts and to and for the several uses,

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intents, and purposes hereinbefore limited to the said *George Lowe*, his heirs and assigns."

The said *Dorothy Axford* duly made and published a codicil to the said will, bearing date 12th of *November* 1770, and which codicil was executed and attested as by law was required to pass freehold estates by devise; and by such codicil the said *Dorothy Axford* devised and bequeathed as follows: — "Whereas I did make and publish my last will and testament, bearing date the 12th day of *October* last past, and whereas, in and by my said last will, after giving and disposing of such part of my estate and effects as therein mentioned, I gave and devised all the rest, residue, and remainder thereof unto *Ann Mary Darwin* therein named, now it is my will and mind, in case the said *Ann Mary Darwin* shall happen to die before she attains the age of twenty-one years, and I do hereby give and bequeath unto *Mary Lowe* in my said will named, all such rest, residue, and remainder of my estates and effects after payment of the several legacies and bequests hereby, and in and by my said will given and bequeathed."

The said *Dorothy Axford* died in *December* 1770, seised of the estates mentioned in her last will, without having altered or revoked her said will in any manner affecting the said devises, except as the same was altered by the codicil, and leaving the said *George Lowe*, and also the said several annuitants mentioned in her will, her surviving. Afterwards all the annuitants, that is to say, *Alexander Croker*, *Mary Smith*, *Charlotte Sibbells*, Mrs. *Spence*, *Susannah West*, *Mary Hargrave*, *Mary Gibson*, and *Mary Manley*, died, leaving the said testatrix's god-daughter *Ann Mary Darwin*, and *Mary Lowe*, *Mary Voss*, and *Jane Spence*, them surviving. The said *Ann Mary Darwin*, *Mary Lowe*, and *Mary Voss* afterwards died, leaving each a daughter her surviving. And the said *Jane Spence* departed this life without

without issue, and, as it was alleged, without leaving any heir at law.

The questions for the opinion of the Court were,

First, what estates passed by the said will of the testatrix, *Dorothy Axford*, to *Ann Mary Darwin*, *Mary Lowe*, *Mary Voss*, and *Jane Spence* respectively; taking the limitations to those persons as limitations of legal estates: and,

Secondly, what estates passed by the said will to the daughters of *Ann Mary Darwin*, *Mary Lowe*, and *Mary Voss* respectively; taking the limitations to them as limitations of legal estates.

Wilde Serjt. *Ann Mary Darwin*, *Mary Lowe*, *Mary Voss*, and *Jane Spence*, took estates for life in the premises; their daughters also took estates for life, with a remainder in fee in the whole to *Ann Mary Darwin*.

The testatrix having employed proper words of inheritance where it was necessary an estate of inheritance should pass, — as to *George Lowe* the trustee, — and having omitted to employ them with respect to the other devisees, must be taken to have known the effect of such omission, and to have made it designedly. *Doe d. Kirby* v. *Holme*. (*a*) If the first class of female devisees be holden to take more than an estate for life, the property might descend to males, whereas the testatrix has evinced the most decided intention to exclude them. The devise being so expressly limited to *A. M. Darwin*, *M. Lowe*, *M. Voss*, and *J. Spence*, and if any of them die leaving a daughter or daughters the share of the party dying to go to such daughters in seniority of age, is a clear proof that the limitation over in case of their dying *without issue*, means, without *such* issue; and the word

(*a*) 2 *Wils.* 80.

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issue might be read daughters: so that an estate tail cannot be implied from the generality of the expression, *without issue*, as if a general failure of issue had been contemplated. In *Foster* v. *Romney* (*a*), where a testator devised one of three estates to trustees and their heirs, until his nephew *Thomas*, son of his brother *William*, should attain twenty-one, or die, and on his attaining twenty-one, to the said *Thomas* for life, sans waste; and after the determination of that estate, to trustees during *Thomas*'s life to preserve contingent remainders, &c.; and after the decease of *Thomas*, to all and every the *son* and *sons* of the body of *Thomas*, severally and successively one after another in priority of birth, &c.: and for default of such issue, to the testator's brother *Joseph* for life, sans waste; and after his death to his son *Joseph* and his heirs: it was held that the nephew and his sons only took estates for life respectively, for want of words of limitation or other tantamount words; the words *for default of such issue*, meaning for default of *son* or *sons*, &c.

Jones Serjt. *contrà*. The four first devisees took an estate tail. The Court will not confine them to an estate for life, or exclude the male line, without seeing an express intention to that effect; and whatever may be surmised, no such express intention is to be found in the will. The devise over, therefore, upon the four first takers dying *without issue*, must be taken as a devise over upon a general failure of issue, and not a mere failure of such issue as had been described before; in which case the Court will imply an estate tail in the first takers; and though they could not imply this, if the expression had been, dying without *such* issue, yet they rather incline to reject the word *such* where it exists, than to

(*a*) 11 *East*, 594.

insert

insert it where it is not found. In *Denne d. Briddon* v. *Page* (*a*), where the devise over was for default of *such* issue, Lord *Mansfield* said, "There is hardly an instance where the words of a devise are restrained to carry a life estate only, but such a construction is against the intention of the testator; for common men do not know the difference between a devise of land and of money. Such, however, being the general settled rule, courts have been astute to find out, if possible, from other parts of a will, what the testator really intended; and it is with pleasure that they have found, in hundreds of cases, sufficient to warrant them in giving full effect to that intention. The question then comes to this, Whether there be enough upon the face of the will to say certainly what his intention was; for we must not go upon conjecture. I conjecture, indeed, that this was a blunder, or slip, and that another limitation was intended; but I do not know what limitation; whether to the heirs general or special. Is there any authority which will enable us to supply the defect, and make another will? If after the limitation to the daughters of *T. N.* the words had been 'and if they die *without issue*,' we would have implied an estate tail; but here the words are, 'for default of *such issue*,' which can only mean the issue mentioned before. The Court have no power to strike out the word *such*." If the Court have no power to strike out the word *such*, still less have they any power to insert it. And it is only where they are fettered by the express introduction of that word, that the Courts refuse to imply an estate tail; *Hay* v. *Earl of Coventry* (*b*), *Stanley* v. *Leonard* (*c*), *Wight* v. *Leigh*. (*d*)

(*a*) 11 *East*, 603. n.
(*b*) 3 *T. R.* 83.
(*c*) 1 *Eden's Rep.* 86.
(*d*) 15 *Ves.* jun. 564.

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Wilde. The rule of law is not disputed; but it is not necessary here to insert the word *such.* From the whole contents of the will, and the immediately preceding mention of the daughters of the first devisees, it is clear the testatrix only meant the estate to go over on failure of daughters.

Cur. adv. vult.

The following certificate was afterwards sent:—

We have heard this case argued before us by counsel, and have considered it, and we are of opinion that under the will of *Dorothy Axford*, the said testatrix, *Ann Mary Darwin*, *Mary Lowe*, *Mary Voss*, and *Jane Spence* took estates for life as tenants in common in the premises mentioned in the will.

That the daughters of the said *Mary Lowe*, *Mary Voss*, and *Ann Mary Darwin* also took estates for life in the shares of their respective parents upon the death of their parents respectively.

That *Ann Mary Darwin* took the remainder in fee in the whole of the said premises.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
E. H. ALDERSON.

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IRVING and Others *v.* MOTLY and Another.

May 5.

TROVER for nineteen bags of wool which, as the Plaintiffs alleged, had been obtained of them by fraud.

The Plaintiffs sued in trover for goods, of which they alleged they had been deprived by fraud in the Defendants' agent: Held, that they might prove the contract made by the agent, without calling him as a witness, although the Defendants were not privy to the fraud.

At the trial before *Gaselee* J., *London* sittings after *Hilary* term, it appeared that the wool in question had been ostensibly purchased of the Plaintiffs on the 18th of *August* 1829, by one *Dunn*, as agent of *Wallington* and Co., and by *Wallington* and Co. pledged, the next day, to the Defendants, as a security for 1400*l.* advanced that day by the Defendants to *Wallington* and Co., through the intervention of *Dunn*, who was also agent to the Defendants.

In order to shew that *Wallington* and Co. had obtained the wool in question without any intention of paying for it; that they had long been in a state of irretrievable embarrassment; and that *Dunn* was privy to their design; the Plaintiffs, after an objection to the evidence, which was overruled, proved the signature of *Dunn* to a letter addressed to the Defendants, *December* 13. 1828, enclosing an invoice of forty-seven bags of *German* wool stated by him (*Dunn*) to have been bought on Defendants' account, but without naming the sellers:—

Amount - - -		£2756	15 11
Discount 5 per cent. -	£137 16 9		
Ditto 3 per cent. additional -	82 14 0		
		220	10 9
Bill at two months -		£2536	5 2

And

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And the same letter stated that *Dunn* had sold the same wools to *Timothy Wallington* and Co. at the same prices, payable by their acceptance at six months, 2½ per cent. discount.

It was then proved that the Defendants drew a bill on *T. Wallington* and Co. for these wools, dated *December* 13. 1828, at six months, for 2683*l.* 17*s.* 6*d.*: due, therefore, *June* 16. 1829.

Duthoit, *Wallingtons'* clerk, proved that *Wallingtons* were sellers of these wools, as well as buyers, and that it was a mere nominal transaction to raise money for *Wallingtons'* house at a loss of about 10 per cent.; but it was not proved that the Defendants had any knowledge of whom the wools were bought.

It was further proved that the bill becoming due in *June* was renewed by the Defendants in two bills, one of them at two, and the other at three months; the first for 1354*l.* 15*s.* 1*d.*, falling due *August* 19., and the other for 1360*l.* 9*s.* 6*d.*, due on the 19th *September*.

Duthoit also proved from entries in *Wallingtons'* books that in five instances in the year 1829, wools were bought by *Wallingtons*, through *Dunn*, of merchants, upon credit, and sold again the same or following day for the same prices at which they had been bought; but with an allowance of discount in consequence of being sold at short credit, making a loss upon each transaction of about 10, or in one or two cases 12½ per cent. And that *Wallingtons'* house and *Dunn*, and several other houses, were mixed up together in very extensive accommodation transactions.

The Defendants being requested to advance the 1400*l.* the day on which the first of *Wallington's* renewed bills for the purchase of *December* 13. 1828, became due, and thereupon suspecting the stability of the firm, required a deposit of wools by way of security; whereupon *Dunn*, who acted for both parties, obtained and transferred the wools as before stated.

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Wallington and Co. stopped payment *August* 29. 1829, and a commission of bankrupt issued against them *September* 5.

A verdict was given for the Plaintiffs, the jury finding,

That the transaction in question was fraudulent;

That the Defendants knew nothing of the fraud, but that *Dunn* was the agent of the Defendants as well as of *Wallington* and Co.

Taddy Serjt. obtained a rule *nisi* for a new trial, on the ground that *Dunn* himself ought to have been called as a witness by the Plaintiffs; that the evidence of his signature ought not to have been received; and that the verdict was against evidence, as a trader was not to be presumed guilty of fraud because he occasionally purchased upon credit, and sold again immediately; for which he referred to *Noble* v. *Adams*. (*a*)

Wilde and *Russell* Serjts. shewed cause. The paper signed by *Dunn* was properly received in evidence. It was not produced to prove the contract on which the party sought to recover, but *Dunn* being charged as privy to a fraud committed on the Plaintiffs, the paper was produced to establish one link in the chain of a conspiracy. *Dunn* could only be fixed with the fraud, by shewing the acts done by him; and the signature of that paper was one of the acts by which it was proposed to explain the fraud. *Dunn* could not have been examined, for he mght have refused to answer questions tending to criminate himself, and the Plaintiffs could not produce a witness whom they proposed to shew unworthy of credit. If, then, *Dunn* obtained the wools of the Plaintiffs by fraud, and without any intention of paying for them, which the jury have found, the Plain-

(*a*) 2 *Marsh.* 366.

tiffs

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tiffs are not divested of their property, but may seek it at the hands of the Defendants. *Parker* v. *Patrick* (*a*) where it was holden that a transferee, without notice, might retain goods which the owner had lost by a fraud, can scarcely be esteemed law. But the case is distinguishable from the present, because in that case the goods were not obtained, as here, by the fraud of the agent of the transferee; and in *Doe d. Willis* v. *Martin* (*b*) it was held, that fraud will vitiate any transaction, although the principal do not personally take any part in the fraud, if his agent do; for the principal is civilly responsible for the acts of his agent. So, in *Glyn* v. *Baker* (*c*) the plaintiffs and defendant having each lodged their respective *India* bonds with the same bankers, who afterwards privily, and without the defendant's authority, sold his bonds, and upon his demand of them delivered up to him the *India* bonds of the plaintiffs to the same total amount, and payable to the same obligee; though the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for them; it was holden, that the defendant was liable to answer over to the plaintiffs for the amount.

However, the Plaintiffs having been deprived of the goods by fraud, were entitled to recover them of the Defendants, even though *Dunn* had not been their agent. The cases of the *Earl of Bristol* v. *Wilsmore* (*d*), *Stephenson* v. *Hart* (*e*), and the cases there cited, clearly establish, that where goods are obtained under the pretence of purchase by a party, who at the time does not intend to pay for them, no property passes from the vendor, and no property can be derived through the vendee to any third person. In *Ferguson* v. *Carring-*

(*a*) 5 *T. R.* 175.
(*b*) 4 *T. R.* 39.
(*c*) 13 *East*, 509.
(*d*) 1 *B. & C.* 514.
(*e*) 4 *Bingh.* 476.

ton,

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ton (*a*), where the defendant purchased goods upon credit, fraudulently intending at the time of the contract not to pay for them, and the vendor brought *assumpsit* for the goods sold before the time of the credit expired, it was held, that although that action was not maintainable, the vendor might have treated the contract as a nullity, and have brought trover immediately to recover the value of the goods. In *Abbotts* v. *Barry* (*b*), and *Corking* v. *Jarrard* there cited, it was held, that even where goods obtained by fraud had been converted into money, the party defrauded might obtain the money in an action for money had and received to his use. In *Noble* v. *Adams*, it was merely decided that the evidence of fraud was so questionable as to require further investigation.

Taddy (*Jones* Serjt. was with him), in support of the rule. The declarations of an agent are not evidence: the agent himself must be called: and the paper signed by *Dunn* was no more than a declaration by an agent. *Dunn* should have been called, because he alone was capable of explaining the transaction, and he might have declined to answer any question which tended to criminate himself. But, at all events, the contract which the paper purported to contain should have been proved by some person who was present when it was concluded. In *Biggs* v. *Lawrence* (*c*), a paper was admitted by which the Defendant's agent acknowledged the receipt of the goods in respect of which the action was brought; that case, however, has been doubted, and Lord *Kenyon* is said to have repeatedly ruled the contrary. *Bauerman* v. *Radenius* (*d*) Then, as to the alleged fraud, *Noble* v. *Adams* is in point to shew that the circumstances of a trader's being in danger of insolvency when he obtains

(*a*) 9 *B.* & *C.* 59.
(*b*) 2 *Brod.* & *Bingh.* 369.
(*c*) 3 *T. R.* 454.
(*d*) 7 *T. R.* 663.

goods,

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goods, and even paying for them by a bill which he knows will be dishonoured, do not amount to such a fraud as to prevent the property in the goods from passing. Unless the goods be obtained by false pretences the property will pass. In *Glyn* v. *Baker*, the defendant had received, instead of his own bonds, bonds of the plaintiff for different sums, and with different numbers; there was enough, therefore, to put him on his guard: and in the *Earl of Bristol* v. *Wilsmore* and *Abbotts* v. *Barry* it was known beforehand that the goods would never be paid for. Here, there is no proof that *Dunn* knew the wool would never be paid for by *Warrington* and Co.

TINDAL C. J. This is an action of trover which the Plaintiffs have brought for a certain quantity of wool, proved to be in the possession of the Defendants, and which the Plaintiffs contend, under the circumstances of the case, the Defendants have no legal right to retain. The ground upon which they maintain that proposition is, that the possession of the wools was originally obtained from them, not under a real contract and sale, as it professed in appearance to be, but by means of the agent of the Defendants, for the purpose of procuring an advance of money to *Wallington* and Co. on the security of the wools, and through the fraud of that agent in endeavouring to give a shew of a contract and sale to that which was no contract at all.

Now, in order to establish the Plaintiffs' case, it became necessary of course to prove the circumstances of fraud on which they intended to rely; and, to do that, the Plaintiffs' counsel stated there was a certain series of purchases which, for a long period past, beginning in *December* 1828, and continuing down to a late period, had been entered into for Messrs. *Wallington* by an agent of the name of *Dunn*; that *Dunn* having effected those

those purchases, there were forced sales at a considerable discount to raise ready money for the wants and embarrassments of Messrs. *Wallington*; and that after all this, the goods in respect of which the Plaintiffs sued were obtained of them for a similar purpose, *Dunn* knowing that *Wallington* and Co. would never pay for them. That was the outline of the fraud with which the Plaintiffs commenced their statement to the jury.

In the course of making that statement out, it became necessary to prove the existence of these purchases; and, for that purpose, the Plaintiffs offered in evidence written contracts of wools sold and delivered, which purported to be effected by *Dunn*; and the first question raised for our consideration is, Whether this was admissible evidence of the contracts that purported to be effected upon the face of the written documents?

It was contended, first, that *Dunn* must be called in order to substantiate those contracts, or that if it was not actually necessary to prove them through *Dunn*, it should be established *aliunde* that they were real contracts, and not merely formal instruments in writing.

It appears to me, however, that this was only one step to be followed up by subsequent evidence of the existence and truth of the contract. The Plaintiffs put in evidence a contract made by *Dunn*, the agent of Messrs. *Wallington*, and, to a certain extent, the agent of the present Defendants. If they had relied upon that alone, and no further evidence had been given, it would have been of no avail; for the proving the contract would have proved no more than you might read upon the face of it, nor would it have been evidence that the contract was carried into effect. But they did not stop there, they called *Du Thoit*, one of the clerks of the party for whom the contract was negotiated, and he proved that the writings were not mere formal bought

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and sold notes, but evidence of real contracts, in which there had been wools bought on the one side, and wools sold on the other, at a considerable discount, indeed at a loss, which none but persons in embarrassment would have consented to. It has been contended that this evidence is not admissible. But it is admissible as one of the steps by which the Plaintiffs shew how the property passed from them to Messrs. *Wallington*. Suppose *Dunn*, instead of going through the form of a negotiation by a bought and sold note, had gone to the warehouse, and taken those goods; you might have proved they were taken by the trespass of *Dunn*. Suppose, instead of that, he had stolen them; you might have shewn the act of stealing without calling *Dunn*; he would not have been a witness against himself. Suppose, thirdly, he had not obtained them by these modes, but by a fictitious purchase, by putting up a man who stands in the place of the real purchaser, who never meant to keep the goods but to hand them over to the present Defendants; the question is, whether you may not prove this third mode of acquiring the property by fraud on the part of *Dunn* without calling *Dunn*.

I think the other parts of the case being made out, of which this is only a step, there is no objection to proving this, by shewing it was a contract entered into by *Dunn* the agent. Suppose, instead of its being a bought and sold note, it had been a bargain and sale of goods of personalty under seal with a subscribing witness; nobody will say *Dunn* need have been called. His testimony would have been objected to. It would have been said, Why not call the subscribing witness? This is only the first step in the case; it is to be made serviceable for the Plaintiffs by the subsequent evidence given, that the contract is acted upon. In the present

case

case there was subsequent evidence given to the jury which satisfies me that the learned Judge did right in receiving the contract.

Then comes the second question, whether the Plaintiffs have any right to recover in the present action upon the ground of fraud. It is put very forcibly on the part of the Defendants, that it would be very dangerous to lay down the rule, where a person purchases commodities, which at the time he is conscious he shall be unable to pay for, that though those goods may have afterwards passed through other hands in the fair way of purchase, the original seller shall have a right to recover them, whosesoever hands they may be in. I agree to the truth of that proposition; but I think such a transaction will not amount to a case of fraud that will vitiate a contract, much less to the case of fraud established here. The ground set up here is, that there was an acting, and an appearance of purchase given to the transfer of these goods, which in truth and justice it did not really possess. Whether *Dunn*, as the agent of *Wallington* and Co., went into the market, and got these goods into his possession by the transfer of *Irving* and Co., under such representation as may amount to obtaining goods under false pretences, it is not necessary to say; but it comes very near that case; it is under circumstances that place him and Messrs. *Wallington* in the light of conspirators to obtain possession of the goods.

Then see how the case stands upon the evidence. So early as *December* 1828, evidence is given of the mode in which Messrs. *Wallington* were keeping up their credit by repeated purchases and forced sales at a ruinous discount. Then we come down to the month of *August*, when the present Defendants, being aware that Messrs. *Wallington* were under embarrassment, request,

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as they might very fairly do, Mr. *Dunn*, who, for that purpose was their agent, to procure them, by way of security, a consignment of wool from Messrs. *Wallington* before making any fresh advance. That being the state of things as to *Dunn*'s knowledge of the mode in which Messrs. *Wallington* were going on, the existence of their pressing embarrassments, and the bills they had to renew, it is not too much to say that they went to market with the certainty or great probability,—and that was left to the jury,—that the wools would never be paid for; that they thought fit to go through the mere formal ceremony of a bought and sold note, not with the design of handing the wools over to the purchaser, but to pass them to the credit of the Defendants: it is not too much to say, that that was a fraud upon the rights of the party selling. At all events it was left to a jury of merchants; and though they have acquitted the Defendants of fraud, yet they involve them in the legal consequences, as it was a fraud committed by their agent, with a view to benefit them; and I am not disposed to disturb the verdict.

PARK J. Agreeing entirely with the judgment delivered by my Lord Chief Justice, it is only to correct an error into which the counsel for the Defendants has fallen, from an inadvertent perusal of *Noble* v. *Adams*, that I say any thing; and I am the more disposed to do so, because I am the only living Judge in this court who was present in 1816 at the pronouncing of that judgment. I am anxious to remove the idea that the Court thought that nothing short of obtaining goods under false pretences would vacate a bargain. I know it is stated in text writers — "where a person obtains goods under false pretences, under the colour of purchase, the property is not changed." But in the case in question

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question it will be seen that Lord Chief Justice *Gibbs* lays down no such restriction: he says (*a*), "This man went from *England* to *Glasgow*, intending to purchase goods there from persons unacquainted with his credit, or with the character of the bills." What the circumstances were does not entirely appear in the case, except that these people at *Glasgow* had been imposed upon. "But by what means he prevailed on *Cross* and Co. to sell the goods is not in proof; and unless his representations amounted to the offence of obtaining goods under false pretences, we cannot take upon ourselves to say the contract was altogether void." That is to say, in the particular case: for, if what his Lordship had said in the outset of his judgment had been attended to, it would have been seen that he meant to guard himself against the conclusion which has been drawn from his expressions: he says, "Without defining exactly what may or may not amount to such a fraud as would render the sale in question absolutely void, we are of opinion that the evidence, as it stands, does not shew any conduct on the part of the plaintiff sufficient to convince us that the transaction is void." He guarded himself against that conclusion, leaving it open to the particular circumstances of each case.

Now, being of opinion that the having obtained goods under false pretences is not the only ground upon which a transaction is void, I feel it unnecessary to say that this runs very near it. I am of opinion the case was very properly left to the jury, and the evidence properly admitted; and that there is no ground for us to set aside the verdict.

GASELEE J. It does not necessarily follow that the Plaintiffs might have maintained this action against any

(*a*) 2 *Marsh.* 370.

person

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person who had *bonâ fide* purchased these goods of Messrs. *Motly* without knowledge of the circumstances which had taken place in the course of the dealings. The ground upon which it is maintainable against the Defendants is, that they had constituted *Dunn* their agent for the purpose of securing themselves by getting a consignment of wool made to them from *Wallington* and Co.; and their agent having thought fit to procure that consignment by means of what the jury have found to be a fraud, however innocently the Defendants may have acted, they cannot take any benefit from the misconduct of that agent.

ALDERSON J. I am of the same opinion. The question in this case is, first, whether there was a fraud committed by *Dunn* and Messrs. *Wallington* upon the Plaintiffs; such a fraud as to prevent the goods passing out of the Plaintiffs. In order to ascertain whether that fraud was committed by *Dunn* and Messrs. *Wallington*, every act of theirs is directly to the point. The course of evidence adopted is nothing more than to shew, that from the course pursued by *Dunn* and Messrs. *Wallington*, with respect to other transactions, it might be inferred they had committed such a fraud as would vitiate the contract for these wools. With that view the evidence is clearly admissible; and it seems to me that the case is confused by treating it as a case of principal and agent; because, for the purposes of the transaction in question, *Dunn* and Messrs. *Wallington* are principals in the fraud; and their acts are evidence against themselves.

This might very well be put upon the ground of conspiracy between *Dunn* and Messrs. *Wallington* to get goods from other persons; and I am by no means prepared to say, that if they had been indicted they could not have been convicted: it is not necessary to give any

any judgment upon that point; but there is abundant ground in the evidence to say that they were guilty of an indictable offence in procuring goods in this manner. If the goods were obtained by means of such conspiracy, then no property passed out of Messrs. *Irving*; and they have a right to maintain an action against the party in whose hands they find the goods.

Then the question is, whether *Parker* v. *Patrick* is a decision to authorize the present Defendants in keeping the goods? There is this material distinction between the two cases, that in this case the business has been transacted by *Dunn* the agent of the Defendants.

Rule discharged.

REGULÆ GENERALES.

WHEREAS, by the ancient course of this Court, the fee paid to the prothonotaries for the entry of every declaration in a cause has hitherto been of right payable at the time of filing thereof; AND WHEREAS it is expedient, that for the future the practice of this Court should be made conformable to that of the respective Courts of King's Bench and Exchequer, so far as regards the time of such payment; IT IS THEREFORE ORDERED, that from and after the essoign day of next *Trinity* term, the fee due to the said prothonotaries for such entry as aforesaid, may be paid at any time previously to entering the issue or passing the record in each cause; or in case there shall be no record, at any time previously to signing interlocutory or final judgment: and further, that in all cases where there shall be

1831. be no judgment, the said fee shall be payable at the time of taxing costs, where the proceedings in any cause are stayed, or such cause terminated by any rule of this Court or order of a Judge.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
E. H. ALDERSON.

IT IS ORDERED, that in future where any amendment in the declaration shall be made after a rule to plead shall have been entered, no new rule to plead shall be necessary, provided such amendment be made in the term or the vacation succeeding the term, in or of which the rule to plead shall have been entered; and the defendant shall have two days exclusive of the day on which the amendment shall be actually made to alter his plea or plead *de novo*, unless otherwise ordered by the Court or the Judge granting leave for the amendment.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
E. H. ALDERSON.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

In the First Year of the Reign of WILLIAM IV.

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JACKSON *v.* HOPKINSON.

May 23.

A new trial having been granted on the ground of the absence of a material witness, and upon condition of Defendant's paying money into Court, the Defendant was not permitted to take the money out of Court upon a suggestion, that though the witness was now accessible the Plaintiff had refused to answer, and was in contempt for not answering a bill in Chancery, filed by Defendant for a discovery, which would have been an answer to the action.

THE Court had in the last term made absolute a rule for a new trial in this cause, on the ground that at the first trial the Defendant had been unable to procure the attendance of one *King*, a material witness, and upon condition of the Defendant's paying into Court the money sought to be recovered.

Storks Serjt. afterwards obtained a rule *nisi* for the Defendant to be permitted to take this money out of

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Court, on the ground that though *King* was now accessible, the Plaintiff had declined to answer, and was in contempt in the Court of Chancery for not answering a bill for discovery filed by the present Defendant against the Plaintiff; the answer to which bill the Defendant now swore would, if true, disclose a perfect defence to this action.

Jones Serjt. now shewed cause. The rule for a new trial was made absolute on condition of the Defendant's paying the money into Court, only because the Defendant could not procure the attendance of *King*. The Defendant ought not now to alter the terms of that rule, by suggesting a difficulty which does not affect the attendance of *King*.

Storks. If the attendance of the witness be unavailing, the Plaintiff ought not to profit by conditions imposed on the supposition that the attendance of the witness would be useful.

TINDAL C. J. There is no ground for this motion. The Defendant comes to the Court for a favour, on the ground of the absence of a material witness: that witness is no longer out of the way; and there is no reason why the Defendant should be placed in a better situation by interposing something not suggested on the original motion. The money may be laid out by the prothonotary in exchequer bills.

Rule discharged.

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BRERETON and Others *v.* CHAPMAN.

May 24.

The lay days allowed by a charter-party for a ship's discharge are to be reckoned from the time of her arrival at the usual *place* of discharge, and not at the *port* merely, though she should for the purposes of navigation discharge some of her cargo at the entrance of the port, before arriving at the usual place of discharge.

ASSUMPSIT on a charter-party.

Independently of a claim of 25*l.* for five days' demurrage, 74*l.* 18*s.* was clearly due to the Plaintiff under the charter-party; but as the Defendant established a set-off, and paid money into Court, making up with the set-off an amount of 92*l.* 3*s.*, including two days' demurrage, the verdict was found for the Plaintiff, with leave for the Defendant to move to set it aside, and enter a verdict for Defendant, unless, under the following circumstances, the Court should think the Plaintiff entitled to four or more days' demurrage beyond the two paid into Court, or he should make up the difference by striking out certain items of the Defendant's set-off.

The vessel was chartered from *Hamburgh* to *Wells*, or so near thereto as she could safely get, with fourteen lay days for shipping and unloading cargo; demurrage to be paid for at 5*l.* a day.

Eight of the lay days were exhausted at *Hamburgh*. The vessel arrived at the entrance of the port of *Wells* on the 16th of *November* 1830. The port is formed by an inlet of the sea, and the distance from the entrance to the quay, where vessels unload, is considerable. On the 17th the vessel was reported; on the 18th, 19th, and 26th, a portion of her cargo was removed into lighters, the vessel drawing too much water to proceed with her entire cargo. On *Sunday* the 22d she might have gone up, but it appeared the crew were on shore; on the 27th the vessel arrived at the quay at *Wells*, and finished unloading her cargo on the 4th of *December*.

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BRERETON v. CHAPMAN.

By the custom of the port of *Wells* the lay days for unloading do not commence running till the vessel arrives at the quay.

Wilde Serjt. having obtained a rule *nisi* for entering a verdict for the Defendant, on the ground that the Plaintiff could not establish a claim for demurrage sufficient to countervail the set-off,

Storks Serjt. shewed cause. The lay days must be reckoned from the time of the vessel's arrival at the entrance of the port, or, at all events, from the time of her beginning to discharge the cargo. The custom of the port will not affect the contract between these parties, which must be construed in the usual way, and which, if the parties had thought it fit, might have contained a stipulation that the custom of the port should be observed; but, in ordinary intendment, arrival at port is accomplished when the ship is at the spot whence she is reported inwards. It was the charterer's election to load the ship so heavily that she could not proceed to the quay without being lightened; but that operation was a commencement of the discharge of the cargo, and the lay days commence running from the first period of discharge. In *Hill* v. *Idle* (*a*) it was held, that the consignee of a particular parcel of goods by a general ship was liable to the owner for not taking them from the ship in a reasonable time, although the delay arose from the necessity for an order from the Treasury to land those goods, which the consignee used the utmost diligence to obtain. *Leer* v. *Yates* (*b*), *Harman* v. *Gandolphi* (*c*) and *Barrett* v. *Dutton* (*d*) are to the same

(*a*) 4 *Campb.* 327.
(*b*) 3 *Taunt.* 387.
(*c*) *Holt's N. P. C.* 35.
(*d*) 4 *Campb.* 333.

effect.

effect. Eight days having been consumed at *Hamburgh* and eight at the quay of *Wells*, the Plaintiff will be entitled to claim for five days' demurrage if he only add the three days during which part of the cargo was discharged into lighters. But he is also entitled to claim for the *Sunday* during which the ship was properly stationary; for the crew ought not to pursue their ordinary calling on a *Sunday*; *Fennell* v. *Ridler* (*a*); and proceeding up the port was not a work of necessity.

Wilde (*Jones* Serjt. was with him) in support of the rule. The lay days are not to be calculated till the vessel arrives at the quay where she is to unload; and the custom of the port must be observed, unless the parties expressly stipulate to the contrary. In the cases which have been cited, the ship had arrived at the place of delivery, after which, any delay rests with the shipper. If the law were otherwise, great claims for demurrage would arise wherever the entrance of the port is distant from the place of discharge, as at *London*, *Hull*, and other places. The rule is laid down in *Abbott on Shipping*, p. 249.: — "The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the custom of the particular places and the usage of particular trades." As to the claim for *Sunday*, to take advantage of the tide is a matter of necessity; but if it were otherwise, there is no reason why the freighter should pay for the piety of the crew.

TINDAL C. J. By the terms of this charter-party the ship was to arrive in the port of *Wells*, or as near thereto

(*a*) 5 *B.* & *C.* 406.

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as she could safely get. Fourteen days were allowed for loading and unloading. Eight of them had been consumed at *Hamburgh*, and if we reckon from the 27th of *November*, when the vessel arrived at the quay for unloading, only six days remained, but the Defendant having employed eight, paid the amount for two into Court.

The question, therefore, is, whether the lay days are to be reckoned from the time when the vessel arrives at the place where it is usual to unload, or from the time when she arrives at the entrance of the port?

If the reckoning were to be commenced before the vessel arrived at the usual place of discharge, the inconvenience would be great in such ports as *London*, which extends to *Yantlet Creek*; or *Hull*, which also extends many miles. In the cases which have been referred to, the vessel had arrived at the usual place of discharge; as in *Leer* v. *Yates*, the case where the ship was at the *West India* docks.

The construction which the Defendant has put on the charter-party is correct; and enough having been paid into Court to cover what was due, the rule must be made

Absolute.

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ABBOTT *v.* PARSONS.

May 24.

TO *assumpsit* for work and labour the Defendant had pleaded a set-off for money paid to the Plaintiff's use, and his particular of set-off contained the following item: — "Cash to *Mann* for flour, 18*l.* 6*s.*"

The Court will not permit a party to move for a new trial on an objection to the applicability of evidence, unless the objection be taken before the Judge commences his summing up.

At the trial before *Gaselee* J. the evidence in support of this item was, that flour to that amount had been furnished by *Mann* to the Plaintiff; that *Mann*, many months before the action, sent his bill in to the Plaintiff, when the Plaintiff's wife complained to *Mann*, and told him to look to the Defendant; since which time no demand had been made on the Plaintiff.

When the Judge was summing up, and not before, the counsel for the Defendant objected that this evidence did not support the particular of set-off. The learned Judge, however, left it to the jury to say whether *Mann* had been paid, and a verdict was found for the Defendant.

Storks Serjt. had obtained a rule *nisi* for a new trial on various objections, and, among others, that the evidence did not support the particular of set-off as to the above item, being evidence rather of an understanding between the parties than of an actual payment: but it appeared that if the evidence of this set-off had been properly admitted, the Plaintiff could claim no more than 4*s.* at the hand of the Defendant.

Wilde and *Goulburn* Serjts., who shewed cause, contended that the objection to the applicability of the evidence should have been made when the witness was in the box, and was too late when the Judge was sum-

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ming up. If so, the Court would not grant a new trial when so small a sum was in dispute, even though the verdict were wrong.

Storks, in support of his rule, urged that there was no evidence of money having been paid to *Mann*.

TINDAL C. J. It has been objected on the part of the Plaintiff that the Defendant's claim in respect of the payment to *Mann* has not been so described in the particular of set-off as to entitle the Defendant to take advantage of it under the evidence which he has given. But it is of the first importance to the administration of justice that objections of this kind should be made when the evidence is offered, and that the party should not lie by to speculate on the accidents of the cause. Here the objection was not taken till the Judge began to sum up to the jury, and the Plaintiff's counsel began to feel the effect of his observations. It is clear from the evidence that *Mann* can make no demand on the Plaintiff, and the cause ought not to go down again.

PARK J. The objection ought to have been made when the witness was called to prove the set-off, because then the evidence might have been admitted or rejected as the case required.

GASELEE J. Under the circumstances it still seems to me that it was properly left to the jury to find whether the money had been paid to *Mann* or not.

BOSANQUET J. Before we give effect to such an objection, we must see that the party who makes it is strictly entitled to do so.

Rule discharged.

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PRESTWICK and Another *v.* MARSHALL.

May 24.

Held, that the indorsee might recover against the acceptor on a bill of exchange drawn and indorsed by a married woman, with the consent of her husband.

THIS was an action on a bill of exchange, drawn by *Lydia Bickerstaff*, accepted by the Defendant, and indorsed by *Lydia* to the Plaintiffs.

Mrs. *Lydia Bickerstaff* was a married woman and kept a school, at which the Defendant had placed his daughter *Thomasine*. Upon application by Mrs. *Bickerstaff*'s husband, the Defendant accepted this bill for the expense of his daughter's education. But considering that his engagement was rather with Mrs. *Bickerstaff* than with her husband, he requested that the bill might be signed by her; in compliance with that request, although the husband drew the bill, it was signed and indorsed by his wife in his presence; and the husband obtained the value of the Plaintiffs, in whose service he was then living.

Upon a former occasion the Defendant had accepted a bill drawn for a similar demand at his request in the same form. That bill, however, was indorsed by the husband. It was objected that the indorsement of Mrs. *Bickerstaff* would not pass any property in the bill, and the verdict was found for the Plaintiffs, with leave for the Defendant to move to set it aside, and enter a nonsuit on this ground.

Cross Serjt. obtained a rule nisi accordingly, relying on *Barlow* v. *Bishop* (*a*), where it was held, that though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the Plaintiff in payment of a debt which she owed him (in

(*a*) 1 *East*, 432.

the

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the course of trading in her own name by consent of her husband), yet the property in the note vested in the husband by delivery to the wife, and no interest passed by her indorsement to the Plaintiff: neither could the Plaintiff recover upon the money counts under such circumstances.

Andrews Serjt. shewed cause. In *Barlow* v. *Bishop*, the husband's assent and authority were wanting: here he expressly authorized the drawing and indorsing the bill; and when it was so drawn and indorsed at the Defendant's request, he is estopped to make the present objection. In *Cotes* v. *Davis* (*a*) it was held, that if a promissory note is made payable to a married woman, and she indorses for value in her own name, and the maker afterwards promises to pay it, in an action against him by the indorsee it will be presumed that the payee had authority from her husband to indorse the note in that form, and the indorsement will be considered as vesting a legal right to the note in the Plaintiff.

Cross. *Barlow* v. *Bishop* is in point. There Lord *Kenyon* said, "It is clear that the delivery of the note to the wife vested the interest in her husband; and as he permitted her to carry on trade on her own account, and this was a transaction in the course of that trade, if she had indorsed the note in the name of her husband, I am not prepared to say that that would not have availed; as many acts of this nature may be done by a power of attorney, and the jury might have presumed what was necessary in favour of an authority from her husband for this purpose. But the indorsement being in her own name, it is quite impossible to say that she

(*a*) 1 *Campb.* 485.

could

could pass away the interest of her husband by it." The property in the bill, therefore, has not passed by the indorsement in the name of the wife, and if the defendant were to pay, he would be liable again in an action at the suit of the husband. Without the husband's indorsement he could not be discharged.

TINDAL C. J. This case is clearly distinguishable from *Barlow* v. *Bishop*. In that case the party to the note was a married woman carrying on trade as a feme sole: the note was given for her benefit; and it does not appear that the husband was cognizant of its existence. Here the husband puts the whole in motion at the outset: he calls on the Defendant for payment of a sum due to his wife for the instruction of the Defendant's child, and himself draws the bill, which is afterwards signed and indorsed by his wife. The Defendant is also acquainted with all the circumstances attending the bill, for he had before accepted a bill drawn in a similar form at his own request. The husband then takes the bill to the Plaintiffs, and obtains value for it through the indorsement of his wife made on the bill in his presence and with his assent. In *Barlow* v. *Bishop* Lord *Kenyon* said, there was not sufficient ground to presume that the indorsement was made with the husband's authority; here it is not necessary to presume that fact, for there is actual proof of the husband's authority: proof enough to bring the case within the decision in *Cotes* v. *Davis*, where the maker having promised to discharge a note indorsed by a feme covert to whom he had made it payable, her indorsement was held to vest a legal title in the Plaintiff; and Lord *Ellenborough* said, "After the acknowledgments and promises of the Defendant in this case, it may reasonably be presumed against him, that Mrs. *Carter* had authority from her husband to indorse the note in question." Here there

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there is no necessity for presuming the husband's authority, of which there is actual proof.

PARK J. I do not differ from the decision in *Barlow* v. *Bishop*; but Lord *Kenyon* said in that case, that acts of this nature may be done by a power of attorney; and that if the wife had indorsed the note in the name of her husband, the jury might have presumed what was necessary in favour of an authority from her husband for that purpose. The evidence necessary for such a presumption is here; and indeed the proof goes far beyond it, if we consider the situation of the parties. Mrs. *Bickerstaff* was a schoolmistress, and had carried on business in her own name: she had drawn a previous bill in the same form as the present, because the defendant, as the business was carried on by her, had imagined that course to be necessary for his security: it was at his request that the present bill was so drawn, and with the full knowledge of the husband. It is remarkable that in *Cotes* v. *Davis* the wife indorsed the bill in the name by which she was known to the world; and although in that case there was a subsequent promise, Lord *Ellenborough* refers to a presumed authority. Here there was ample proof of the authority, and the verdict ought not to be disturbed.

GASELEE J. The circumstance that the first bill was indorsed by the husband does not vary the case; for we are not informed of all the circumstances attending that bill, and it might have passed to a holder who required the husband's indorsement. Here the bill was drawn in a form under which the Defendant had accepted a former bill; he insisted on the drawer's pursuing that form, and accepted the bill, knowing she had a husband: that amounts to a promise to pay a bill so drawn; and there is no need for presuming authority, since

since there is the express authority of the Defendant that the bill should be so drawn, and the express authority of the husband that the Plaintiffs should hold it so drawn.

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BOSANQUET J. I am of the same opinion: the indorsement was made by the authority of the husband, and consequently the property in the bill passed to the Plaintiffs. In *Barlow* v. *Bishop* there was no evidence of the husband's authority; but Lord *Kenyon* thought that if the bill had been indorsed in the husband's name, with his authority, it would have been sufficient; and in *Cotes* v. *Davis*, although the indorsement was in the name of the wife, Lord *Ellenborough* presumed that the husband had given his authority: it is true the presumption arose from a subsequent promise, but it was admitted that under the husband's authority the property in the bill would pass. Here the authority does not rest on presumption, but is established by direct proof. *Cotes* v. *Davis*, therefore, is an authority expressly in point for the Plaintiffs, and the rule must be

Discharged.

HILL *v.* FEATHERSTONHAUGH. *May* 25.

THIS was an action on an attorney's bill. The Defendant having lent money to one *Taylor*, on the security of bank stock, and having some suspicion as to the safety of the security, employed the Plaintiff, an attorney,

An attorney cannot charge for work which is useless towards accomplishing the object his client has in view, although performed through inadvertence or inexperience, and not with the design of imposing on the client.

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attorney, to look into the matter. The Plaintiff made some enquiries, had an interview with the solicitor of the bank, copied some deeds, and put a *distringas* on *Taylor*'s stock; for which services he now sought to recover 15*l.*

At the trial before *Tindal* C. J., *Middlesex* sittings after *Easter* term, the Plaintiff proved the retainer by letters from the Defendant, which contained the following passages: — "With respect to *Taylor*'s business, I must leave it to your better judgment. Would it not be well to see if the stock be still remaining? I had no idea but that a *distringas* acted as a complete barrier to any one's selling out: you can lodge a fresh *distringas*, and give them notice as you proposed." ——

— "From the conversation I had with you in town, that it was possible for a party to sell stock though a *distringas* had been lodged, I have been very uncomfortable."

On the part of the Defendant, who paid 5*l.* into Court, it was contended that the business for which the Plaintiff sought to recover was altogether useless to the Defendant and suggested to him by the Plaintiff merely for the purpose of making a charge; and the solicitor of the bank was called, who stated that the *distringas* for which the Plaintiff had charged was, under the circumstances of the case, unnecessary for the Defendant's security.

The Chief Justice directed the jury to consider whether the work done was of any use to the Defendant, and whether, from the correspondence put in by the Plaintiff, they could infer that he knew of a previous *distringas*, and had advised a second.

A verdict having been found for the Defendant,

Cross Serjt. moved for a new trial on the ground of misdirection. An attorney is entitled to charge, even though

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though the work done be useless to the client, provided it be done *bonâ fide* according to the best of the attorney's judgment. He is responsible for gross negligence, but not for a mistake in judgment. Thus, if he be directed to make an arrest, and issues a writ into one county, supposing the debtor to be there, but it turns out that the debtor is in another, the client must bear the expense of the proceeding. The attorney is no more liable than a regular medical practitioner who fails in an operation.

Admitting, however, that the Plaintiff is precluded from charging, if a *distringas* had been previously issued, there was no evidence here that such was the case. The writ itself ought to have been produced, that the Judge might have decided on its effect; and its existence ought not to have been assumed from an obscure expression in a letter from the Defendant himself, whose success depended upon the proof.

TINDAL C. J. In this case I left it to the jury to consider, whether the business which had been done was necessary for the purposes of the client, or useless and unnecessary: and whether the Plaintiff knew of the first *distringas*, and had advised a second. Two objections have been made to that direction: first, that the utility of the business to the client was too narrow a ground on which to rest the Plaintiff's charge; secondly, that a *distringas* having been spoken of, the Judge ought to have required the production of it in order to determine its effect, and not to have assumed its existence from an expression in the Defendant's letter.

As to the first point, the question was left in the ordinary way in all actions for work and labour, namely, whether the labour has been of any service to the party charged. I have always thought that if an attorney, through inadvertence or inexperience, — for I impute no

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no improper motive to the Plaintiff, — incurs trouble which is useless to his client, he cannot make it a subject of remuneration, the meaning of which is, a reward for useful labour. If a surgeon were to make his patient undergo an unnecessary operation, or a course of medicine which plainly could be of no service, he could not make it a subject of charge. If we pass from professions to trade, could a bricklayer, who had placed a wall in such a position as to be liable to fall, charge his employer for such an erection? In order to apportion payment, we must examine how the work has answered.

Upon the second point, I agree, that if nothing had passed between the parties on the subject, the Court could not have proceeded without seeing the *distringas*. But upon the correspondence it was plain the parties were adverting to a former *distringas*, and it seemed clear to me that the Plaintiff had acted with full knowledge of that circumstance; and I left it to the jury, upon the correspondence put in by the Plaintiff himself, whether or not they would infer that the Plaintiff had advised the second *distringas*, and was aware of the first. Then comes the question, whether the second *distringas* was of any use. The solicitor to the bank gave evidence that it was unnecessary; and it was for the jury to say from that, whether it was useless to the Defendant, and whether the Plaintiff knew it to be so, when it appeared from the correspondence that he had seen the solicitor of the bank before he proceeded.

GASELEE J. There is no ground for complaining of the mode in which this was left to the jury. When a client employs an attorney, he relies on the judgment of the attorney, and is entitled to expect the exercise of competent skill; but the attorney has not an unlimited discretion, and is not to pursue a course which will be manifestly

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manifestly useless to his employer. The question here was, whether the business done was necessary for accomplishing the object which the Defendant had in view when he retained the Plaintiff? That was a question which it was proper to leave to the jury, and there seems to be no reason for impeaching their decision.

BOSANQUET J. The sum sought to be recovered being under 20*l.* there can be no new trial, unless there has been a misdirection of the jury, and I am of opinion the direction was right; for when a party employs a professional person, he proposes to profit by the exercise of his agent's skill; and it is a proper question for the jury, whether what has been done was necessary for the object the employer had in view. With respect to the alleged insufficiency of proof, the existence of the first *distringas* is inferred from letters given in evidence by the Plaintiff, and he cannot complain that the Defendant makes use of documents produced by his opponent.

ALDERSON J. I am of the same opinion. The letters produced by the Plaintiff shew, that the only question between the parties was, not as to the existence, but the effect of the *distringas*. It seems that the Plaintiff was wrong in supposing that further steps were necessary for his client. In *Duncan* v. *Blundell* (*a*), *Bayley* J. says, — "Where a person is employed in a work of skill, the employer buys both his labour and his judgment: he ought not to undertake the work if it cannot succeed, and he should know whether it will or not." There are two cases in which a party is precluded from recovering for work and labour; one,

(*a*) 3 *Stark. N. P. C.* 6.

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where work, which is useful, has been performed unskilfully; the other, where work, which is useless for the object in view, has been performed even skilfully. In the case of a medical man, if an operation, which *might* have been useful, has merely failed in the event, he is nevertheless entitled to charge; but if it could have been useful in no event, he would have no claim on the patient.

Rule refused.

May 25.

FAIRMANER *v.* BUDD.

Plaintiff's witnesses alleged that Plaintiff bargained to give Plaintiff's colt for Defendant's mare and 10*l.*; and that Plaintiff's colt was not warranted.

Defendant's servant produced a receipt as follows, which he had drawn up when he paid the 10*l.*, some time after the bargain:

"Received 10*l.* for a colt warranted sound." This receipt was signed by the Plaintiff, an illiterate man: Held, that the receipt was not conclusive; and that it was properly left to the jury to find whether the warranty of the colt formed any part of the bargain, or was inserted in the receipt without authority, by an after-thought of the Defendant's servant.

THE Plaintiff declared, that in *May* 1830 a mare of the Defendant's had been standing at certain stables kept by one *Osborne*, and had been there seen by the Plaintiff; and that on the 3d of *August* following, in consideration that the Plaintiff, at the special instance and request of the Defendant, would deliver to the Defendant a horse of the Plaintiff in exchange for the said mare of the Defendant, together with the sum of 10*l.* to be paid by the Defendant to the Plaintiff, the Defendant undertook and promised the Plaintiff, that the Defendant's mare was as fresh as when she was at *Osborne's*, except that she might have a little more flesh, having been turned out to grass, and in as good condition as when Plaintiff saw her at *Osborne's*, and sound. Averment, that the Plaintiff delivered his horse in exchange for the said mare and 10*l.*, and took the mare into his possession with a view to accept her. Breach, that the

mare

mare was weak and emaciated, and sorely diseased with the mange and divers other diseases, and in much worse condition that when Plaintiff saw her at *Osborne's*, and altogether unsound.

At the trial before *Tindal* C. J., *Middlesex* sittings after *Easter* term, the Plaintiff's witnesses deposed to the warranty of the Defendant, and to the unsoundness of the mare; and they denied that the Plaintiff had warranted the horse which was sent to the Defendant in lieu of the mare.

It appeared, however, that some hours after the bargain, the Defendant's coachman being sent with the 10*l.* which the Plaintiff was to receive in addition to the Defendant's mare, met the Plaintiff at a public-house, where the landlord wrote out the following receipt, which the Plaintiff signed with his mark: —

"Received of Mr. *Budd*, *August* 4. 1830, 10*l.* for a grey four year old colt, warranted sound in every respect."

The Defendant's witnesses denied the unsoundness of the mare, and alleged, that the colt was only three years old, and of little value.

The Defendant's counsel objected, that the contract was misdescribed in the declaration; for, according to the Plaintiff's receipt, it turned out to be a contract to sell a four year old colt, warranted sound, for a mare and 10*l.*, whereas the declaration represented it to be an exchange of a horse, not warranted sound, for a mare and 10*l.*; therefore, the entire consideration for the Defendant's promise was not stated as it ought to have been: *Clarke* v. *Gray* (*a*): upon which,

The Chief Justice left it to the jury to find, whether the Plaintiff had warranted the colt at the time of the bargain, or whether the warranty had been foisted into

(*a*) 6 *East*, 563.

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the receipt by an after-thought of the Defendant's coachman; and the jury being of opinion that the latter was the case, found a verdict for the Plaintiff.

Spankie Serjt. now moved to set aside the verdict, on the objection urged at the trial, and on the ground of a misdirection. The receipt was conclusive to shew what the contract was on the part of the Plaintiff; and the jury ought not to have been permitted to consider parol evidence conflicting with it, unless upon the ground of fraud, which was not suggested.

TINDAL C. J. We have no wish to impugn the rule that it is necessary to state in the declaration the whole consideration for the Defendant's promise; for unless the whole be stated, it is not the contract between the parties. The question, therefore, is, whether the whole has been stated here? On the 3d of *August* the parties met to negotiate the exchange of a colt of the Plaintiff for a mare of the Defendant and 10*l.*, provided the mare were in as good a condition as when the Plaintiff saw her at *Osborne's* stables. There was no proof of any warranty of the Plaintiff's colt upon that occasion. Some time after the bargain had been concluded, the Defendant's coachman, at a public-house, upon paying the Plaintiff the 10*l.* agreed on, caused a receipt to be drawn up in a certain form, which the Plaintiff, an illiterate man, signed with his mark; and the question is, whether that receipt was drawn up according to the real contract between the parties? The rest of the evidence in the cause being at variance with such a supposition, it could only be left to the jury to find whether what the witnesses said was true, and the form of the receipt an after-thought of the coachman: they considered it an after-thought, and I see no reason for disturbing the verdict.

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GASELEE J. It was properly left to the jury to determine what the contract was. It is admitted that they might enquire whether the warranty was inserted in the receipt by fraud; and as the terms of the receipt are nothing like the terms of the contract proved, it was for them to say whether they could attach any credit to it at all.

BOSANQUET J. No doubt the whole consideration for the Defendant's promise ought to be stated, and it may be conceded the receipt was *some* evidence of the transaction between the parties; but it was not conclusive evidence: and it was for the jury to find what the contract was.

ALDERSON J. concurring, the rule was

Refused.

REED and Others *v.* WILMOT and Another.

May 26.

Upon a mortgage to *R.*, *A.*, and *B.* as a security for 365*l.* due from the mortgagor, no other sum being specified in the deed; Held, that a 4*l. ad valorem* stamp was sufficient, although the 365*l.* was made up of three separate debts due to *R.*, *A.*, and *B.* severally.

IN *January* 1830 one *Hement*, a trader, by deed assigned to the Plaintiffs *Reed*, *Allen*, and *Bower*, three of his creditors, certain lighters, as a security for 365*l.* due from him to them. By the deed it was stipulated that *Hement* should retain possession of the lighters till the *July* following, when, in default of payment, the mortgagees were to take possession.

The sum of 365*l.* was made up of three separate debts: 225*l.* due to *Reed*; 88*l.* 12*s.* to *Allen*; and 51*l.* 8*s.* to *Bower*. This fact appeared upon evidence

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produced by the Plaintiffs to prove the consideration of the deed, and was not in any way apparent from the terms of the conveyance, which was made to *Reed*, *Allen*, and *Bower* jointly. The aggregate sum was the only sum specified.

Besides this, certain copyhold property of *Hement's* was mortgaged to them at the same time by a deed of surrender out of court, as a further security for the same aggregate sum.

The deed of assignment of the lighters, which referred to the deed of surrender, was stamped with an ordinary deed stamp; the surrender of the copyhold with an *ad valorem* stamp of 4*l.*

Hement having become bankrupt, the Defendants, his assignees, sold the lighters, and the Plaintiffs sought to recover the proceeds by an action of money had and received.

At the trial before *Alderson* J., last *Northampton* assizes, it was objected, that as the deed secured the debts of three persons, the *ad valorem* duty ought to have been charged in respect of each separate debt, which would have made it amount to 6*l.* instead of 4*l.* The verdict was taken for the Plaintiffs, with leave for the Defendants to move to enter a nonsuit on that objection.

Wilde Serjt. moved accordingly. By the stamp act 55 *G.* 3. *c.* 184. *schedule, part* 1., the duty on any mortgage exceeding 200*l.*, and not exceeding 300*l.*, is 3*l.*; exceeding 50*l.*, and not exceeding 100*l.*, 1*l.* 10*s.* "And in case the same shall be made as a security for the payment or transfer to different persons of separate and distinct sums of money, or shares in any of the said stocks or funds, the said *ad valorem* duty shall be charged for and in respect of each separate and distinct sum of money,

money, or share in any of the said stocks or funds therein specified and secured, and not upon the aggregate amount thereof." Although one sum only is specified, this deed is a security for three separate sums due to three separate creditors; and as each has the benefit of the security, the *ad valorem* duty ought to have been charged in respect of each separate debt; otherwise a ready mode is presented for eluding the statute and defrauding the revenue, by making a mortgage to a trustee for the aggregate amount of the debts of any number of creditors. The act, therefore, must be read as if there were a comma after *money*, and after *secured*, and *specified* and *secured* must apply only to the antecedents, *stocks* and *funds*.

At all events, the *ad valorem* stamp on the whole mortgage being on the copyhold deed is without effect; for it is provided that "where several distinct deeds or instruments falling within the description of any of the instruments hereby charged with the *ad valorem* duty on mortgages and wadsets shall be made at *the same time*, for securing the payment of one and the same sum of money, or one and the same share of any of the stocks or funds before mentioned, the said *ad valorem* duty, if exceeding 2*l.*, shall be charged only on one of such deeds or instruments; and all the rest shall be charged with the duty to which the same may be liable under any more general description of such deeds or instruments contained in this schedule; and if required for the sake of evidence, all the rest of such deeds or instruments shall be also stamped with some particular stamp for denoting or testifying the payment of the said *ad valorem* duty on all the said deeds or instruments being produced duly stamped with the duties hereby charged thereon.

"And where any copyhold or customary lands or hereditaments shall be mortgaged by means of a conditional

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ditional surrender or grant, the said *ad valorem* duty shall be charged on the surrender or grant, or the memorandum thereof, if made out of court, or on the copy of court roll of the surrender or grant, if made in Court. And where any copyhold or customary lands or hereditaments shall be mortgaged or charged, together with other property, for securing one and the same sum of money, or one and the same share of any of the stocks or funds before mentioned, the said *ad valorem* duty shall be charged on the deed or instrument relating to the other property."

Then, the mortgagee never having taken possession of the lighters, no property passed. In a mortgage of personal property delivery is essential to the transfer. *Ryall* v. *Rolle*. (*a*)

The Plaintiffs, therefore, must be nonsuited.

A rule *nisi* having been granted,

Storks Serjt. shewed cause. A single stamp is sufficient; only one sum being specified in the deed, and the contributors having the benefit of only one security. They have no separate remedy; and it is only where the parties to a mortgage have separate remedies that the legislature proposed to exact separate stamps. The consideration expressed in the deed is single, and it is not to be impeached by parol evidence. *Baker* v. *Dewey*. (*b*)

The objection that the *ad valorem* stamp is placed on the wrong deed was not taken at the trial, and therefore cannot be entertained now.

A mortgage of personal property is valid without delivery, provided the mortgagor's possession be consistent with the deed. In *Edwards* v. *Harben* (*c*) it was

(*a*) 1 *Atk.* 165. (*b*) 1 *B.* & *C.* 704. (*c*) 2 *T. R.* 587.

laid

laid down as a general rule in the transfer of chattels that the possession must consist with the deed; therefore where the conveyance was absolute, the possession must be delivered immediately; where it was conditional, it would not be rendered void by the vendor's continuing in possession till the condition should be performed.

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Wilde and *Russell* Serjts. were heard in support of the rule.

TINDAL C. J. On the trial of this cause the Plaintiffs produced in evidence a deed purporting to be a mortgage of personal property, including certain barges or lighters, when it was objected that the deed was not properly stamped, having only a common deed stamp, instead of an *ad valorem* stamp, which the law requires on such a transaction; to which it was answered, that the deed referred to another, a conveyance of copyhold property by surrender out of court, as part of the security for the sum advanced, and that the *ad valorem* stamp in respect of the whole sum was attached to that deed of surrender.

It was then objected that a single *ad valorem* stamp was insufficient, because the object of the deed was to secure the repayment of 365*l.* to three different creditors in distinct rights, and there should have been an *ad valorem* stamp in respect of each distinct debt. A verdict was found for the Plaintiffs, subject to the opinion of the Court upon this objection to the stamp. The question depends on the language of 55 *G.* 3. *c.* 184., *schedule*, — "In case the deed shall be made as a security for the payment or transfer to different persons, of separate and distinct sums of money, or shares in the said stocks or funds, the said *ad valorem* duty shall be charged for and in respect of each separate and distinct sum

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sum of money, or share in any of the said stocks or funds therein specified and secured, and not upon the aggregate amount thereof."

It is contended, that on this deed there are three separate creditors, and that several stamps on the separate amounts of their respective debts would carry the sum to a greater amount than 4*l.*

That objection, however, cannot prevail. For, according to the act, in order to justify a stamp for each of the separate debts, it should appear by the deed that it was given as a security for the payment of separate and distinct sums. But this deed is a security for a single sum of 365*l.*; and if it had been taken to the stamp office, it is not easy to see how a stamp could have been affixed on it higher than the *ad valorem* upon the single gross sum specified, since the only criterion or test by which they could estimate the charge would be the sum specified in the deed. Nor does the case fall within the reason of the statute, the object of which was to obtain a separate stamp for each separate security: but the three creditors here have not the benefit of a separate security. If either of them died his representatives could only proceed in the name of the survivor, and must resort to a court of equity to compel him, if unconsenting. The stamp act, as a revenue law, is to be construed strictly with reference to the rights of the subject.

It has been urged in reply, however, that the *ad valorem* stamp, if sufficient, has been affixed to the wrong deed; for the act says, "And where any copyhold or customary lands or hereditaments shall be mortgaged or charged, together with other property, for securing one and the same sum of money, or one and the same share of any of the stocks or funds before mentioned, the said *ad valorem* duty shall be charged on the deed

or

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or instrument relating to the other property;" and we cannot so read this clause as to relieve the party from the difficulty. The first objection is, that the stamp on the deed produced is not of sufficient amount; to which it is answered, that a stamp of sufficient amount will be found on a deed referred to; but when the deed referred to is produced, the Court cannot avoid perceiving that it is not the deed on which, according to the provisions of the act, the stamp ought to have been affixed. It is true, this point was not expressly taken at the trial; but when a stamp objection is made at *Nisi Prius*, the Court is not bound to enter immediately into all the minute provisions of the stamp act. The justice of the case is, that the cause should go to a new trial upon payment of costs by the Plaintiffs.

PARK J. gave no opinion on the stamp, having been absent during the discussion; but, as to the other point, observed, that the case of *Edwards* v. *Harben* had never been doubted. In that case *Buller* J. said, "So long ago as in the case in *Bulstrode*, the Court held, that an *absolute conveyance*, or gift of a lease for years, unattended with possession, was fraudulent; but if the deed or conveyance be *conditional*, there the vendor's continuing in possession does not avoid it, because, by the terms of the conveyance, the vendee is not to have the possession till he has performed the condition." That exactly corresponded with the circumstances of the present case. The lighters were to be given up in the month of *July* following the deed, if the money advanced had not been repaid; that circumstance shewed there was no fraud in the transaction.

GASELEE J. The objection, that three persons with distinct debts ought not to have a security under a single

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single stamp, is an objection that cannot be sustained; and I am by no means satisfied that the omission to specify the separate sums renders the deed fraudulent or void, as the counsel for the Defendant have contended. In *Doe dem. Higginbotham* v. *Hobson* (*a*), a deed of conveyance, which omitted truly to set out the whole consideration, directly or indirectly paid, or agreed to be paid for the estate conveyed, was held not to be void under 48 *G.* 3. *c.* 149. *s.* 22.; and *Holroyd* J. said, "Even supposing the 3000*l.* to be the consideration for the lease, still the statute does not make the instrument itself void. It directs that the consideration-money shall be truly expressed, but it does not say, that if it is not expressed the conveyance shall be void; on the contrary, it seems studiously to guard against the consequence; for all it says is, 'that in case the consideration money shall not be truly expressed and set forth in the manner hereby directed, the purchaser, and also the seller, shall forfeit the sum of 50*l.*, and shall also be charged with five times the amount of the excess of duty which would have been payable for the instrument in respect of the full consideration money, in case the same had been truly expressed, beyond the amount of the duty actually paid.' In any event, therefore, the deed is not avoided by the omission, but only subjects the parties to the penalties mentioned." The objection, that the stamp is affixed to the wrong deed, is not to be got over. But *Edwards* v. *Harben* establishes the validity of a *bonâ fide* mortgage of chattels.

BOSANQUET J. I agree with the rest of the Court. The objection, that the *ad valorem* stamp is on the wrong deed, admits of no answer; but inasmuch as it

(*a*) 3 *D.* & *R.* 186.

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was not distinctly presented to the Judge at the trial, I agree that the rule should be for a new trial, and not for a nonsuit. Upon the validity of the mortgage, *Edwards* v. *Harben* is a leading case, and consistent with all the principles of law.

Rule absolute for a new trial.

BATES *v.* STURGESS.

May 26.

THIS was an action by an assignee of a bankrupt against the messenger to recover a penalty for not paying over sums received under the commission.

A second assignee, who continues by suggestion on the record a suit commenced by his predecessor, may under *s.* 67. 6 *G.* 4. *c.* 16. recover a penalty as well as his predecessor.

The action had been commenced by a former assignee, and upon his death had been continued under a suggestion upon the record by the Plaintiff as his successor, by virtue of the sixty-seventh section of 6 *G.* 4. *c.* 16., which enacts, that "whenever an assignee shall die, or a new assignee or assignees shall be chosen as aforesaid, no action at law or suit in equity shall be thereby abated, but the Court in which any action or suit is depending may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee or assignees to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same."

At the trial it did not become necessary for the Plaintiff to produce the proceedings under the commission, evidence of his title to sue appearing *aliunde*; it did not appear, therefore, whether the assignment had been entered of record or not.

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A verdict having been found for the Plaintiff,

Andrews Serjt. moved to set it aside, on the ground that the Plaintiff should have established his title to sue, by shewing that the assignment had been recorded pursuant to *s.* 96. 6 *G.* 4. *c.* 16.; [*Tindal* C. J. It was not necessary for the Plaintiff to produce the assignment; the objection is answerd by proof *aliunde*;] and, secondly, that the sixty-seventh section, which enables a succeeding assignee to continue a suit, ought not to be deemed to extend to an action for a penalty. If the Court had been apprised of the nature of the action they would not have allowed the suggestion to be entered.

TINDAL C. J. This depends upon the language of the sixty-seventh section of 6 *G.* 4. *c.* 16. Nothing can be more large or comprehensive than the language of that section; it conveys every right to the new assignee, for he is to sue in the same manner as if he had originally commenced the action; and there is no ground for the distinction which has been attempted; for the 100th section enacts, that "all sums of money forfeited under this act, or by virtue of any conviction for perjury committed in any oath hereby directed or authorized, may be sued for by the assignees in any of his Majesty's courts of record; and the money so recovered (the charges of suit being deducted) shall be divided among the creditors." If the money recovered is to be distributed in the same way as the assets of the bankrupt, the succeeding assignee must be the party to make the distribution, and, consequently, to recover it for that purpose.

PARK J. I am of the same opinion: the Plaintiff was not bound to put in the proceedings under the commission if he could prove his case *aliunde*. As to the other

other objection, if there were any ground for it, the proper course would have been to have moved to rescind the order for the suggestion on the record.

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GASELEE J. concurred.

BOSANQUET J. The objection on the ninety-sixth section can only arise where it becomes necessary for the Plaintiff to produce the proceedings under the commission. As to the penalty, the whole of this was to be distributed among the creditors; and there does not seem to be any reason for distinguishing it from other claims.

Rule refused.

HAYNES v. HOLLIDAY.

May 26.

THE Defendant, owner of a vessel about to sail for the *Swan River*, agreed in writing to take out for the Plaintiff a boat, not exceeding thirty feet in length, and ten and a half in beam. The Plaintiff paid his money, and presented his boat, which was within the stipulated dimensions, but constructed with a deck, being one of the sailing craft well known in the river *Thames* by the name of *hatch-boats*. The Defendant refused to take the boat unless the Plaintiff removed its deck, or permitted it to be removed by the Defendant's carpenter, who promised to replace it on arriving at the

Defendant agreed to convey on board his ship a *boat* for the Plaintiff, of certain dimensions. Plaintiff presented a *decked* boat, within the size agreed on:

Held, that evidence was properly received of a practice to take off the decks of such boats when they were stowed on board ships; and that the Plaintiff having declined to permit his deck to be removed, could not sue the Defendant for breach of agreement.

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Swan River. This the Plaintiff declined; the boat was left in *England;* and this action was commenced to recover damages for breach of the agreement.

At the trial, the Defendant's witnesses alleged that it was the practice to take the decks of such boats out when they were conveyed on board ship, because with their decks on they presented a greater obstruction to the navigation of the vessel. *Alderson* J. observing that the word *boat* was often employed to designate vessels of heavy tonnage, which could not have been contemplated by the language of this agreement, although, perhaps, it might comprehend a decked boat of small size, left it to the jury to say whether what the Plaintiff had presented was a boat; whether it was usual to take out the decks of such boats when they were conveyed on board ship; and if so, whether the Plaintiff had declined to take out his.

A verdict having been found for the Defendant,

Taddy Serjt., pursuant to leave reserved at the trial, moved to set it aside, and to enter a verdict for the Plaintiff instead.

It was not denied, even by the Defendant, that a hatch-boat is a boat in the narrowest sense of the word: there is no ambiguity in the agreement; and, therefore, evidence ought not to have been admitted to add to its terms a condition as to taking out the deck. Even if the Defendant, according to the alleged custom, was entitled to take the deck off, he was bound to take the boat on board; and whether he refused to do so or not, should have been the question left to the jury, — not, whether the Plaintiff declined to have the deck taken out. If it be inconvenient to convey decked boats, the Defendant might have excluded them by adding a single word to the written agreement; which, as it stands, must be taken most strongly against himself.

The

The evidence as to the alleged custom was altogether a surprise on the Plaintiff, and he is prepared to rebut it.

Cur. adv. vult.

TINDAL C. J. We think there is no ground for granting a rule in this case.

The agreement between the parties is, "In consideration of the sum of 50*l.* now paid, or previous to embarkation, I, the master of the ship *Protector*, bound to the *Cape of Good Hope* and *Cockburn Sound*, agree to take out to the above places a boat, not exceeding thirty feet in length, or ten feet and a half in breadth, dangers of the seas excepted." When the boat was presented to the Defendant to be received on board his ship, it was covered with a deck; and, according to the evidence, that would obstruct the navigation of the ship. Although the terms of the contract may include a decked as well as an open boat, yet it must be implied that the boat should be such as not to impede the navigation of the ship. The objection was mentioned to the Plaintiff at the time, and the Defendant's carpenter offered to take off the deck; so that the Plaintiff, by refusing, has himself prevented the Defendant from performing his contract.

After what passed on that occasion, the evidence offered by the Defendant could scarcely be a surprise on the Plaintiff.

Rule refused.

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May 27.

STANIFORTH *v.* FOX.

"*G. F.* does this day agree to let to *J. S.* three cottages for ten years; he further agrees to build a brewhouse and make a cellar; at the rent of 35*l.*: he agrees to pay the ground rent; and has this day received 4*l.* from *J. S.* in earnest;"

Held, an actual demise, and not an agreement for a lease.

THIS was an action of *assumpsit* tried at the last *York* assizes before *Littledale* J., in which the instrument set out below being essential to the Plaintiff's case, and being stamped only with an agreement stamp, the Plaintiff was nonsuited, with liberty to move to enter a verdict for 7*l.*, should the Court be of opinion that the instrument signed by the parties was an agreement and not a lease:—

"*Sept.* 11. 1830.

"An agreement between *George Fox* and *John Staniforth*. I *George Fox* does this day agree to let Mr. *John Staniforth* the whole of his premises situate in *Spring Street, Sheffield*, for the term of ten years; namely, three cottage houses, one stable, and victualling-house, and all other buildings thereto connected; also he does further agree to build a brewhouse, and make a large cellar under the yard at his own expense; at the yearly rent of 35*l.*, to be paid half-yearly. And that the said *George Fox* does further agree to pay the ground rent, which is 4*l.* 0*s.* 3*d.* yearly, for the whole of the premises. And that the said *George Fox* has this day received from the said *John Staniforth* the sum of 4*l.* in earnest."

Jones Serjt. obtained a rule *nisi* to enter the verdict for the Plaintiff, on the ground that this instrument must be deemed an agreement for a lease, and not an actual demise; because the lessor had engaged to make additions to the premises, which it would take some time to complete, and for which, if this were held an actual

actual demise, the lessee would be paying rent before he could have enjoyment. In *Dunk* v. *Hunter* (*a*), where, by the language of the instrument, the landlord "agreed to let on lease," the circumstance that money was to be paid down by the lessee on entry was relied on by the Court as conclusive against the implication of any present demise. Here the engagement by the lessor to lay out money on entry ought to have the same effect.

Cross Serjt. shewed cause. In *Dunk* v. *Hunter* there was in effect a stipulation for a future lease, and for entry at a future day, which is wanting here. But an instrument shall operate as a present demise, if such can be collected to have been the intention of the parties, even though there be a stipulation for a future lease; *Doe d. Walker* v. *Groves* (*b*), *Barry* v. *Nugent*, cited in *Roe* v. *Ashburner* (*c*); and the words, "*does this day agree to let*," accompanied with the payment of earnest-money, are a sufficient indication of an intention to demise at once. In *Roe d. Jackson* v. *Ashburner* (*d*), *Ashhurst* J. says, "Where the words are *de præsenti*, 'I demise,' &c., or an agreement 'that the party shall hold and enjoy,' and the party is immediately put into possession, the landlord shall not afterwards turn him out of possession, and say that it was not a present demise; for the permitting the party to enter is strong evidence to shew that the landlord intended to give a present interest." In *Poole* v. *Bentley* (*e*), where there was to be a future lease, Lord *Ellenborough* inferred a present demise, from the circumstance that the lessee was to lay out money on the premises; and the like inference was drawn in *Pinero* v. *Jud-*

(*a*) 5 *B.* & *A.* 322.
(*b*) 15 *East*, 244.
(*c*) 5 *T. R.* 165.
(*d*) 5 *T. R.* 163.
(*e*) 12 *East*, 168.

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son (a) from that circumstance and a stipulation to pay in the mean time, the rent to be reserved in a proposed future lease. In *Tempest* v. *Rawlings* (b), where the instrument was held to be an agreement only, there was a stipulation for a future lease, and no indication that the party should have immediate possession.

Jones. The intention ought only to be collected from the instrument itself in each individual case; *Doe d. Coore* v. *Clare* (c), *Morgan* v. *Bissell.* (d) In *Pinero* v. *Judson* the stipulation to pay rent in the intermediate time was a sufficient indication of an intention to demise *in præsenti.* So, a similar stipulation in *Poole* v. *Bentley*, where money was to be laid out by the lessee. But there are no words of present demise in this instrument; and that circumstance, added to the stipulation for the enlargement of the premises at the expense of the lessor, must, according to the rule established in *Dunk* v. *Hunter*, be taken as conclusive proof that no present demise was intended. Here, although the lessor agrees to let on the 11th of *September*, it is nowhere said when the term is to commence, or the rent to be paid; nor does it appear that the lessee ever had possession.

TINDAL C. J. We must endeavour to collect the meaning of the parties from the instrument itself, because there is no collateral evidence to assist us in the enquiry. The instrument begins, "*George Fox* does this day agree to let." Now the word *agree* will not of itself exclude the inference of a present demise, where there is nothing else to shew that such a demise was not intended. But the language here is, "does *this day* agree to let the premises in *Spring Street for the term of ten years.*" When

(a) 6 *Bingh.* 206.
(b) 13 *East*, 18.
(c) 2 *T. R.* 739.
(d) 3 *Taunt.* 65.

was

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was that term to commence? There is nothing in the instrument from which we can date the commencement of the term, but *that day*. The demise, therefore, was a demise from that day. And though the landlord agreed to build a brewhouse and make a cellar, there is nothing in the instrument to shew that rent was to be deferred to any future day. This distinguishes the case from *Dunk* v. *Hunter*, where, by express stipulation, the entry was to be at a future day, and to depend on the lessee's paying down 50*l*.; which if he failed to do, the term might never have commenced.

Here, too, the lessee pays 4*l*. down by way of earnest, probably as some equivalent for the ground rent, which nearly corresponds in amount; and if he contributes towards a charge then running on, why are we to say that the term has a future commencement? Or, as the instrument appears to have been drawn up by unlearned persons, and the 4*l*. bears so large a proportion to the whole rent, we may reasonably suppose it was paid on account of rent. But without relying too much on that, it is sufficient to say, that no day is fixed for the rent to commence in future, nor is there any other stipulation from which we can infer that the parties intended an immediate interest should not pass. The rule, therefore, which has been obtained to enter a verdict for the Plaintiff must be discharged.

PARK J. I am of the same opinion. The cases are not conflicting, because they depend upon what has appeared to be the intentions of the respective parties, and the instruments under consideration have generally been drawn up by unlettered persons. *Dunk* v. *Hunter* makes against the Plaintiff; for in that case it was expressly stipulated that the lessee should enter at any time before the 11th of *February* 1820, paying in ready cash on entry 50*l*. Here there is no stipulation for

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entry at a future day, or on any condition, but the lessor does "this day agree to let for ten years." If a future demise had been intended, would he not have said, "for ten years to commence at" such a time? The agreement to build a brewhouse and cellar is merely accessory, and does not constitute any part of the principal demise.

GASELEE J. I am of the same opinion. *Agree to let* and *let* mean the same thing, unless there is something in the instrument to shew that a present demise could not have been in contemplation.

BOSANQUET J. This is an executed demise, and not an executory agreement. There is no difference between *agree to let* and *let*, where the relation of landlord and tenant is to commence immediately. Here, it would be impossible to say when it should commence, unless, according to the express language of the instrument, it were to commence on that day. The agreement by the landlord to build is merely accessory; the demise is immediate, and not deferred by that accessory engagement.

Rule discharged.

See *Drake* v. *Munday* (*a*), *Tisdale* v. *Essex* (*b*), *Maldon's Case* (*c*), *Sturgion* v. *Painter* (*d*), *Baxter d. Abrahall* v. *Browne* (*e*), *Goodtitle d. Estwick* v. *Way* (*g*), *Doe d. Bromfield* v. *Smith* (*h*), *Hamerton* v. *Stead* (*i*), *Knight* v. *Benett* (*k*), *Cox* v. *Bent* (*l*), *Regnart* v. *Porter*. (*m*)

(*a*) *W. Jones*, 231.
(*b*) 6 *East*, 530.
(*c*) *Cro. Eliz.* 33.
(*d*) *Noy*, 128.
(*e*) 2 *W. Black.* 973.
(*g*) 1 *T. R.* 735.
(*i*) 3 *B.* & *C.* 478.
(*k*) 3 *Bingh.* 361.
(*l*) 5 *Bingh.* 185.
(*m*) 7 *Bingh.* 451.

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JOHN VALLANCE *v.* SAVAGE.

May 27.

In case for an injury to his reversion, the Plaintiff declared that the premises in question were in the occupation of *S. P.* as tenant to him: Held, that the allegation was sufficiently proved by shewing that *S. P.* had been let into possession by, and paid rent to, a *cestuique trust*, to whom Plaintiff was trustee.

THIS was an action against the Defendant, one of the commissioners for paving the town of *Brighton*, for an injury to the Plaintiff's reversionary interest in certain premises by the side of the market there.

The declaration stated that, before and at the time of the committing the grievances in the several counts thereinafter mentioned, the Defendant then and still was one of the commissioners appointed and acting under and by virtue of, and for putting into execution, an act of parliament for the better regulating, paving, improving, and managing the town of *Brighthelmstone* in the county of *Sussex*, and the poor thereof; and that also before and at the time of the committing the grievances thereinafter next mentioned a certain messuage with the appurtenances, situate and being at, &c., was in the occupation of one *Sarah Pell*, as tenant thereof to the Plaintiff, to wit, at, &c.; and that also before the committing of the grievances thereinafter next mentioned there was, and still of right ought to be, a public and common highway for all the liege subjects of our lord the king to pass and repass at their free will and pleasure, on foot and with carts, unto and to the said messuage every year, and at all times of the year, and thereby to pass into a certain door of the yard of the said messuage, there to deliver goods and chattels, and to frequent the said messuage for the more beneficial and profitable use and occupation of the said messuage; and the said messuage with the appurtenances, until the times of committing the said grievances thereinafter next mentioned, was, and of right ought to have been, and

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still of right ought to be, of free and easy access to all customers of *Sarah Pell*, and all the king's liege subjects passing in and along the said highway who might be desirous of frequenting the said messuage for the purpose of employing the tenant or tenants for the time being of the said messuage, occupiers of the same messuage in the way of her, his, or their business from time to time carried on therein; yet the said commissioners, acting as aforesaid, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the Plaintiff in his said reversionary estate and interest of and in the said messuage, with the appurtenances, whilst the said messuage was so in the possession and occupation of *Sarah Pell*, as tenant thereof to the Plaintiff, and whilst he the Plaintiff was so interested therein as aforesaid, to wit, on, &c., and on divers other days and times, to wit, at, &c., wrongfully and unjustly, and without the leave or licence and against the will of the Plaintiff, made and erected, and caused to be made and erected, in and upon said highway divers obstructions, erections, and buildings, and wrongfully and injuriously kept and continued the said obstructions, erections, and buildings in and upon the said highway respectively for a long space of time, to wit, from thence until, &c.; by means of which said several premises the Plaintiff had been injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said messuage, with the appurtenances, so in the possession and occupation of the said *Sarah Pell*, as tenant thereof to the Plaintiff, to wit, at, &c.

At the trial before *Gaselee* J., last *Sussex* assizes, it appeared that the Plaintiff had the legal title to the reversion of the premises in question, but that he was trustee for *James Vallance*; and that *Sarah Pell*, the occupier, was in possession under a contract with *James Vallance*,

Vallance, to which the Plaintiff was no party. *James Vallance* received the rent.

The spot on which the obstruction had been placed by the Defendant had been used as a carriage-way ever since 1776, and as a footway long before.

The commissioners for paving the town of *Brighton* were first appointed by an act of parliament passed in 1773; from which, and two subsequent acts for erecting a market and other improvements, the present commissioners, their successors, derived their authority.

On the part of the Defendant it was objected, first, that the evidence did not support the allegation in the declaration, that *Pell* was the tenant of the Plaintiff; she being the tenant of the *cestuique trust*.

Secondly, that as the commissioners were appointed for a specific purpose, the user of the *locus in quo* as a carriage road since 1776, which would afford strong presumption of a dedication to the public if the *locus* had been the property of a private person, afforded no such presumption against the commissioners, inasmuch as it would have been a violation of their trust to dedicate to the use of the public, for general purposes, the spot which they were bound to limit to the purposes to which the acts of parliament confined them: the Plaintiff therefore, at the utmost, could only claim in respect of an obstruction to a foot road. And,

Thirdly, that having alleged an obstruction of a cart and foot road, he must be nonsuited; because that allegation was not divisible.

A verdict, however, was taken for the Plaintiff, with leave for the Defendant to move for a nonsuit on these points.

Jones Serjt. obtained a rule *nisi* accordingly; against which

Taddy

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Taddy and *Wilde* Serjts. shewed cause; when, upon the learned Judge's reading his report, it appeared that the *locus in quo* had been conveyed to the commissioners as recently as 1828, and not before 1810 to the guardians of the poor, from whom the commissioners took it. In the interval, therefore, between 1776 and 1810 no objection could be raised to the presumption of a dedication to the public; and the Court had to decide only on the first objection raised at the trial: as to which it was contended, that in this action it was sufficient if the Plaintiff proved he had a reversion; it was immaterial who was tenant, or, at all events, to whom the tenant paid rent. But the occupier must, in a court of law, be taken to be the tenant of the party who has the legal reversion, and a contract with a *cestuique trust* must be deemed to have been made with the assent of the legal owner. In *Taylor* v. *Waters* (*a*), the grantee of a licence to be exercised on land, conferred by a *cestuique trust*, never having been disturbed by the trustee, was considered to hold it in effect under the trustee, and competent therefore to sue on it in a court of law. In like manner, an occupier let into possession by a mortgagor after the mortgage, may be considered as tenant of the mortgagee, if an assent to the tenancy can be collected from the conduct of the mortgagee. *Pope* v. *Biggs*. (*b*)

Jones. It might not have been necessary for the Plaintiff, as reversioner, to have alleged who was tenant of the premises; but having alleged that *S. Pell* was his tenant, he is bound to prove it; *Cotterill* v. *Hobby* (*c*); otherwise it does not appear that it is the Plaintiff's reversion which has been injured. But there was no privity of contract between him and *S. Pell*: he

(*a*) 7 *Taunt*. 374.
(*b*) 9 *B. & C*. 245.
(*c*) 4 *B. & C*. 465.

could

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could not have distrained; and he might at any time have ejected her. In *Martin* v. *Goble* (*a*), where, in an action for a nuisance to a dwelling-house, the declaration stated, that at the time of committing the grievance Plaintiff was seised in fee of the dwelling-house, and that it was then *in the possession and occupation of a certain tenant or certain tenants thereof under Plaintiff*, it appeared that Plaintiff was seised in fee for the use of the inhabitants of a particular parish, and that the house was occupied by the parish paupers and a person appointed by the parish officers to take charge of them, it was therefore held, that neither the poor nor the master of the workhouse could be considered as tenants to the Plaintiff, and that that was a fatal variance between the declaration and the evidence.

TINDAL C. J. This is an action on the case by *John Vallance*, for an injury to his reversion in a certain messuage and premises at *Brighton*; and the injury is described to be the wrongful erection and continuance of an obstruction on the highway leading to the Plaintiff's messuage, in stating his title to which he alleges that it was in the occupation of one *Sarah Pell* as his tenant. It has been objected that *Sarah Pell* was not tenant to the Plaintiff, but to *James Vallance*; and, consequently, that the Plaintiff had not the reversionary interest set forth in the declaration. The evidence was, that *John Vallance* the Plaintiff was a trustee; that *James Vallance* was his *cestuique trust*, and had let the premises in question to *Sarah Pell*, from whom he received the rent. It was therefore the simple case of trustee and *cestuique trust*. The legal interest is in the trustee; actions must be brought by him; the *cestuique trust* has no interest in law: if he enters, his pos-

(*a*) 1 *Campb.* 320.

session

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session is considered the possession of the trustee; and any disposition made by him and adopted by the trustee is considered as the disposition of the trustee, the *cestuique trust* only possessing the property in the right of the trustee. In the present case, inasmuch as the Plaintiff has brought an action, and has alleged that *Pell* was a tenant to him, that is a sufficient adoption of her as tenant; and there has been no failure in the proof of the allegation on record. Even in the case of mortgagor and mortgagee, whose interests are adverse, acts of the mortgagor assented to by the mortgagee are considered as acts of the mortgagee. By the stronger reason, therefore, the act of the *cestuique trust*, whose interest is under the trustee, must, if known and not repudiated, be considered the act of the trustee.

PARK J. I am of the same opinion. The Plaintiff is the legal owner, and properly entitled to sue; the case is not altered by the circumstance of the *cestuique trust* having granted a lease: he must, to a certain degree, be deemed the agent of the trustee, and his acts, if ratified by the trustee, are valid.

GASELEE J. The occupier was tenant to the Plaintiff on an agreement of the *cestuique trust*, who for that purpose must be esteemed the agent of the trustee; the rent, which was payable to the trustee, being by implied permission paid to the *cestuique trust*.

BOSANQUET J. The whole legal right is in the Plaintiff; the *cestuique trust*, who has no legal interest, must, in a court of law, be considered as an agent who has let in the tenant: the tenant does not occupy adversely to the Plaintiff; he has the reversionary interest subject to her right of possession, to which he must be taken to have assented. The rule must be

Discharged.

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KEELING *v.* AUSTIN.

May 28.

Notwithstanding the statute 1 *W.* 4. *c.* 70. the Court will not stay execution issued after a writ of error on a judgment of nonsuit.

THE Defendant having issued a *fi. fa.* upon a judgment of nonsuit after a writ of error had been allowed and served;

Bompas Serjt. obtained a rule *nisi* to stay the proceedings in the execution.

Wilde Serjt., who shewed cause against the rule, relied on *Mee* v. *Hopkins* (*a*), and *Evans* v. *Swete* (*b*), where the Court refused to stay execution issued after error on a nonsuit.

Bompas urged, that in *Levett* v. *Perry* (*c*) execution had been stayed after error on a judgment of nonsuit, and in addition to the arguments in support of the motion to be found in *Evans* v. *Swete*, where the point was fully discussed, contended, that during a writ of error the jurisdiction of the inferior court was suspended by the statute 1 *W.* 4. *c.* 70. *s.* 8., which enacts, "That writs of error upon any judgment given by any of the said Courts shall hereafter be made returnable only before the Judges, or Judges and Barons, as the case may be, of the other two Courts in the Exchequer Chamber, any law or statute to the contrary notwithstanding; that a transcript of the record only shall be annexed to the return of the writ; and the court of error, after errors are duly assigned and issue in error joined, shall, at such time as the Judges shall appoint, either in term or vacation, review the proceedings, and give judgment as they shall be ad-

(*a*) 2 *D & R.* 208.
(*b*) 2 *Bingh.* 326.
(*c*) 5 *T. R.* 668.

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vised thereon; and such proceedings and judgment, as altered or affirmed, shall be entered on the original record, and such further proceeding as may be necessary thereon shall be awarded by the Court in which the original record remains; from which judgment in error no writ of error shall lie or be had, except the same be made returnable in the high court of parliament."

TINDAL C. J. The new act has not the effect contended for: it only establishes a new court, leaving the practice the same as before. In this Court for many years, and in the King's Bench lately, it has been the practice not to stay execution issued after a writ of error on a judgment of nonsuit. It has been urged that staying execution after error on a judgment by default, is a stronger case than this: but, upon error on a judgment by default, the Defendant takes advantage of some defect in his adversary's proceeding, whereas it can be permitted to no man to take advantage of a defect in his own.

PARK J. *Kempland* v. *Macauley*(*a*) is in point against the application. There Lord *Kenyon* said, "The general rule is, that a writ of error, allowed and served, operates as a supersedeas to an execution, and the Court will stay proceedings of course; but that is on the supposition that the party may have some error to complain of in the judgment, which it is right should be examined into before execution is awarded; and, therefore, if it appear plainly and unequivocally to the Court that the writ of error is brought merely for delay, that reason does not hold."

Rule discharged.

(*a*) 4 *T. R.* 436.

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MARGETSON *v.* WRIGHT.

May 31.

ASSUMPSIT on a horse-warranty.

The Plaintiff, an attorney, being desirous of possessing a race-horse, went to examine the Defendant's stallion *Sampson*. *Sampson* was a crib-biter; had a splint on the off fore-leg; and had broken down in training. If these defects, which the Defendant disclosed to the Plaintiff, had not existed, *Sampson*, who was at that time sound in other respects, would have been worth 500*l*. Under these circumstances, however, he was to be sold for 90*l*.; and a *French* veterinary surgeon having reduced the splint, and having communicated a recipe which afforded a chance of eradicating it altogether, the Plaintiff was disposed to make the purchase.

He first, however, required a warranty that *Sampson* would stand training, which the Defendant refused to give. The Plaintiff then wrote a memorandum of agreement, which specified the amount and times of payment, and stipulated that the Plaintiff should, in addition, give the Defendant 10*l*. a time for the first five times the horse should win races in 1830; and concluded as follows, — "And the said Mr. *Wright* does hereby warrant the said horse to be sound wind and limb."

This, however, the Defendant declined to sign unless the words "*at this time*" were added after *wind and limb*; which being done, the warranty was signed, and the Plaintiff took away his bargain.

About six months afterwards *Sampson* again broke down in training; and the Plaintiff upon that ground commenced the present action.

Upon proof of these circumstances at the last *Westmoreland* assizes, *Parke* J., before whom the cause was tried,

1. Defendant warranted sound wind and limb *at the time of the bargain*, and sold for 90*l*., a race-horse which had broken down in training, and was affected with a splint; circumstances which were disclosed to the Plaintiff, and but for which the horse would have been worth 500*l*.: Held, that this warranty did not import that the horse was fit for the purposes of an ordinary horse:

2. The warranty being restricted to the time of the bargain, *semble*, the Plaintiff could not sue in respect of the horse breaking down afterwards.

3. Defects apparent at the time of a warranty are not included in it.

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tried, told the jury that the insertion in the warranty of the words "*at this time*" were probably intended to exclude a warranty of the horse's standing training; and then stated the question to be, whether at the time of the warranty the animal was sound for the purposes of an ordinary horse, as to go on the road, or the like; the express warranty rendering the Defendant responsible for the consequences of the splint, though the defect was visible.

A verdict having been found for the Plaintiff,

Wilde Serjt. moved for a new trial, on the ground that the jury had been misled by the construction which the learned Judge had put upon the warranty. The splint, being a visible defect, ought to have been considered as excluded from the warranty; and, seeing that the horse was worth 500*l.* but for the splint, and that he was about to be sold for only 90*l.*, it was plain that the Plaintiff bought him at a risk, and that the warranty was confined to the time of the bargain, excluding all future accidents. It was for the purpose of so restricting the warranty that the words "*at this time*" were introduced; and "*sound wind and limb*," when predicated of a race-horse, means merely that the animal is in health; not that he is fit for the purposes of an ordinary horse, such as the road, drawing, or the like; purposes to which a race-horse can never be applied. The Plaintiff paid for the chance of *Sampson*'s recovery from the splint, and for his worth as a stallion, which was all the warranty meant to ensure.

A rule *nisi* having been granted,

Spankie Serjt., who shewed cause, contended that the warranty was good for nothing if it did not ensure to the Plaintiff a horse fit at least for ordinary purposes; it being admitted there was little or no chance that *Sampson*

son could ever again be employed as a race-horse. But this was not like the case of a patent or avowed defect. It being doubtful whether the horse would recover from the splint or not, it was the more essential to the Plaintiff to rely on a warranty from the seller; and from what happened so soon afterwards, it might be presumed the horse could not have been sound at the time of the warranty.

Wilde and *Jones* Serjts. having been heard in support of the rule,

TINDAL C. J. said, This was an action on a warranty of a horse, the terms of which were, "The said Defendant doth hereby warrant the said horse to be sound wind and limb at this time."

Two subjects, which might or might not have become a source of unsoundness, namely, crib-biting and a splint, were discussed by the parties at the time of the bargain, and after that discussion the warranty in question was entered into. Now, the older books lay it down, that defects apparent at the time of a bargain are not included in a warranty, however general, because they can form no subject of deceit or fraud; and, originally, the mode of proceeding on a breach of warranty was by an action of deceit, grounded on a supposed fraud. There can, however, be no deceit where a defect is so manifest that both parties discuss it at the time. A party, therefore, who should buy a horse knowing it to be blind in both eyes could not sue on a general warranty of soundness. In the present case the splint was known to both parties; and the learned Judge left it to the jury to say whether the horse was fit for ordinary purposes. His direction would have been less subject to misapprehension if he had left them to consider whether the horse was, at the time of the bargain, sound wind and limb, saving those manifest defects contemplated by the par-

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ties. It seems to us, therefore, that the jury may have been in some degree misled, and that the purposes of justice will be better attained by sending the cause to a second enquiry.

The rest of the Court concurring, the rule was made Absolute.

May 31.

SLATER *v.* MILLS.

Defendant, a married woman, was arrested upon a bill of exchange which she had given for the education of children by a former husband. The Plaintiff having been apprised of the second marriage, the Court discharged the Defendant upon a summary application, although she had given out that she had property of her own, and that the bill would be duly paid.

THE Defendant, a married woman, having been arrested upon her acceptance of a bill of exchange,

Wilde Serjt., upon an affidavit of the coverture deposed to by the husband, obtained a rule *nisi* for her discharge.

Taddy Serjt. shewed cause upon affidavits, which stated that the bill was accepted by the Defendant for the schooling of a child by a former husband, and by the schoolmistress indorsed to the Plaintiff; that the Defendant had been in the habit of paying the child's expenses by acceptances in the name under which she passed during her widowhood, *Murray*; but upon her accepting the present bill in the name of *Mills* the schoolmistress became apprised of the marriage, and required an acceptance by the husband. The Defendant, however, said, the bill was accepted for the expenses of her children by a former husband; that she had property of her own; and that the bill would be duly paid.

Taddy referred to *Luden* v. *Justice* (*a*), where, in an action against a feme covert, the Court refused, upon a sum-

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SLATER v. MILLS.

a summary application, to cancel the bail-bond, and permit defendant to file a common appearance, she having acted with great duplicity in eluding payment; and argued, that the Court would not relieve the present Defendant summarily on motion when she had herself misled the drawer by representations of separate property, and assurances that the bill would be paid. Under such circumstances the Court would leave her to her plea of coverture, that the Plaintiff might have time to enquire into the truth of the allegation.

Wilde. In the case cited the Plaintiff had no knowledge of the coverture at the time the greater part of the debt was contracted, and the husband was dead before the application. Here the drawer of the bill was expressly apprised of the coverture; and if she consents to take a bill from a married woman she takes it with all its consequences, one of which is that the Defendant will be discharged summarily on motion, unless she has acted with bad faith, of which no proof is offered here.

TINDAL C. J. In this case the fact of coverture is placed beyond dispute; and if the parties went to trial on the plea of coverture, there could be no doubt of the result, so that all the intermediate expense of pleading would be thrown away. The marriage having been known to the drawer of the bill, the Defendant is entitled to apply to the Court for her discharge; but as she induced the party to receive the bill by representations as to her means of payment, the rule must be absolute without costs.

Rule absolute accordingly.

(*a*) 1 *Bingh.* 344.

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June 1.

CAUNT *v.* WARD.

A testator left annuities of 20*l.* a year to two female servants: one of the devisees married during the testator's life, upon which, by a codicil, he left her annuity for her sole and separate use: the other having married after his death, and there being no such condition attached to her annuity, Held, that it passed to the assignees of her husband upon his becoming insolvent.

REPLEVIN for goods. The Defendant, as bailiff of *Thomas Henson* and *Sarah* his wife, made cognizance that one *William Hornbuckle*, before and at the time of making the devise thereinafter next mentioned, and from thence continually until and at the time of his death, was seised of the said messuage or dwelling-house, in which, &c., with the appurtenances, in his demesne as of fee; and being so seised, the said *William Hornbuckle*, long before the Plaintiff had any thing in the said dwelling-house, in which, &c., to wit, on the 31st of *August* 1811, at, &c., duly made and published his last will and testament in writing, signed by him the said *William Hornbuckle*, and attested and subscribed in the presence of the said *William Hornbuckle* by three credible witnesses, and thereby declared his mind and will to be, that in case *Elizabeth Bates* and the said *Sarah*, then called *Sarah Bates*, who were then in his service, should continue in the service of his sister *Elizabeth Hornbuckle* until her decease, and should conduct themselves towards her with the like good conduct they had been accustomed to do towards him the said *W. Hornbuckle*, then and in such case the said *W. Hornbuckle* did thereby give and devise unto them the said *E. Bates* and *Sarah* the respective annual sums of 20*l.* each, free and clear of all deductions whatsoever, for and during the term of their respective lives; such payment to commence from the day of the decease of his said sister, and to be paid to the said annuitants by equal quarterly payments: and the said *W. Hornbuckle* did, by his said will and testament, expressly charge

charge and make chargeable the said dwelling-house, in which, &c., into whose hands or possession soever the same might thereafter come, with the payment of the said respective annuities of 20*l.* each accordingly: and the said *W. Hornbuckle* did also will and declare, in and by his said will and testament, that in case either of the said annuities, or any part or parts of them, or either of them, should at any time continue in arrear and unpaid for the space of twenty-eight days next after the day or time when the same should respectively become due and payable as aforesaid, that he did, in and by his said will and testament, authorize, empower, and direct either of them the said annuitants, whose annuity or annuities might be so in arrear as last aforesaid, to enter into and upon all or any part or parts of the said dwelling-house, in which, &c., and to distrain for such arrears, and to impound, sell, or dispose of the distress or distresses that might be taken in the usual or ordinary way, and to act in the same manner in all respects as landlords in general are by law entitled to act upon or against their tenants for rent when in arrear, and until the full amount of the arrears of the said respective annuities, and all charges and expenses whatsoever attending the recovery of the same, should have been satisfied and discharged. And afterwards, and whilst the said *W. Hornbuckle* was so seised of the said dwelling-house, in which, &c., and long before the said Plaintiff had had any thing therein, to wit, on, &c., at, &c., the said *W. Hornbuckle* made and published a codicil in writing to and as a part of his said will and testament, duly signed by the said *W. Hornbuckle*, and attested and subscribed in the presence of the said *W. Hornbuckle* by three credible witnesses, and thereby declared and directed, that in case the said *E. Bates* and the said *Sarah*, then called *Sarah Bates*, or either of them, should continue in the service of his said

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sister until her decease as aforesaid, but not otherwise, then the said several and respective annuities or rent-charges should go to and be paid to them the said *E. Bates*, otherwise *E. Roe*, (she the said *Elizabeth* having then lately intermarried with *John Roe*, of *Radford Lane*, manufacturer,) and the said *Sarah*, for and during their respective natural lives, generally and absolutely, and without any contingency, condition, or restriction whatsoever, save and except as last aforesaid, and save and except that the receipt or receipts of her the said *E. Roe* should from time to time, and at all times, during her natural life, be a good and sufficient discharge or good and sufficient discharges for the said annuity or rent-charge to any trustees, or to the other persons liable to the payment of the same, although her husband might not join therein or sign the same, inasmuch as the said *W. Hornbuckle* intended the same for her own sole and separate use and benefit, and independent and in exclusion of her said husband; and the said *W. Hornbuckle* thereby confirmed his said will and testament in all other points and respects, save and except wherein he had altered the same by the said codicil as aforesaid; and afterwards, to wit, on, &c., at, &c., died seised of the said dwelling-house, in which, &c., without having altered or revoked his said will and codicil: after whose death, to wit, on the 17th *January* 1825, the said *E. Hornbuckle*, the sister of the said *W. Hornbuckle*, also died, to wit, at, &c. And the Defendant further said, that the said *Sarah* continued in the service of *E. Hornbuckle* from and after the death of the said *W. Hornbuckle* until and at the time of the death of the said *E. Hornbuckle*, to wit, at, &c., and that after the death of *E. Hornbuckle*, to wit, on, &c., she the said *Sarah* intermarried with the said *Thomas*, to wit, at, &c.: and because a large sum of money, to wit, 10*l.* of the said annuity or rent-charge, for two quarters of

of a year ending respectively on the 17th of *January* and the 17th of *April* 1830, and from thence continually until and at the said time when, &c., was due and in arrear from the said Plaintiff to the said *Thomas* and *Sarah* his wife, the said sum and every part thereof having then been due and in arrear more than twenty-eight days, he the said Defendant, as bailiff of the said *Thomas* and *Sarah*, well acknowledged the taking of the said goods and chattels in the said declaration mentioned in the said dwelling-house, in which, &c., as just, &c., as for and in the name of a distress for the said arrears of the said annuity or rent-charge due and in arrear as aforesaid.

The Plaintiff pleaded in bar, that after the said intermarriage of *Thomas Henson* and *Sarah*, and before any part of the said annuity or rent-charge so in the said cognizance alleged to have become due and in arrear became so due and in arrear, to wit, on the 9th of *January* 1829, the said *Thomas Henson*, then being a prisoner in actual custody within the walls of a certain prison in that part of the United Kingdom called *England*, to wit, the prison of the gaol of the town and county of the town of *Nottingham*, upon process for and by reason of a certain debt at the suit of *William Shaw*, did duly, and according to the directions and provisions of the statute made and provided in the seventh year of the reign of our late King *George* the Fourth, intituled "An Act to amend and consolidate the laws for the relief of insolvent debtors in *England*," apply by petition in a summary way to the court for relief of insolvent debtors for his discharge from such custody as aforesaid, according to the provisions of the said act; which said petition was then duly subscribed by the said *Thomas Henson*, and was afterwards, to wit, on the 16th of *January* 1829, filed in the said court, pursuant to the directions

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in the said act contained. And the Plaintiff further said, that *Thomas Henson* did at the time of subscribing the said petition, to wit, on, &c. at, &c., duly execute a conveyance and assignment to one *Henry Dance*, being the provisional assignee of the said court, in such form as is to the said act annexed, of, amongst other things, all the estate, right, title, interest, in and to all the real and personal estate and effects of the said *Thomas Henson*, being such prisoner as aforesaid, both within this realm and abroad, except wearing apparel, bedding, and other such necessaries of the said *Thomas Henson* and his family, and the working tools and implements of the said *Thomas Henson*, not exceeding in the whole the value of 20*l.*; which said conveyance and assignment so executed as aforesaid, in form aforesaid, did then and there, by virtue of the said act, vest the said several supposed arrears of the said annuity or rent-charge in the said cognizance mentioned, and all the right, title, interest, and trust of the said *Thomas Henson* of, in, and to the same, in the said *Henry Dance*, as such provisional assignee of the said court as aforesaid, to wit, at, &c. (The plea then stated the conveyance by the provisional assignee, under an indenture of 13th *March* 1829, of all the interest vested in him to *Thomas Bishop*, *Charles Spencer*, and *Thomas Brown Milnes*, the permanent assignees under *Henson*'s insolvency.) And thereupon, by virtue of the said indenture and the said statute, the said several supposed arrears of the annuity or rent-charge in the said cognizance mentioned, and all the right, title, interest, and trust of the said *Thomas Henson* of, in, and to the same, did then and there become and were vested in the said *Thomas Bishop*, *Charles Spencer*, and *Thomas Brown Milnes*, as such assignees as aforesaid, to wit, at, &c.

Demurrer and joinder.

Russell

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Russell Serjt. in support of the demurrer. If property be given to a feme covert, expressly or by necessary implication, for her sole and separate use, and the husband becomes bankrupt, the commissioners cannot assign it to the husband's assignees. In *Vandenanker* v. *Desborough* (*a*), the testator devised 800*l.*, to be paid within six months after his death, to one Mr. *Ruffine*, in trust to lay it out and invest it in a purchase for the benefit of the *wife* of *J. S.*; and to settle it so that after her death it might come to her children, and the interest in the mean time be paid to such person as ought to receive the profits. *J. S.* became a bankrupt; and the Plaintiff, as his assignee, sought to have the interest of the money decreed to him during the joint lives of baron and feme. But the Court held, that this not being any trust created by the husband, nor any thing carved out of his estate, but given by a relation of the wife's, and intended for her support and maintenance, it was not liable to the creditors of the husband; and that the Plaintiff had no title thereunto as assignee of the commission of bankrupt; and therefore decreed that it should be paid to *Ruffine* the trustee, to be laid out in land, and settled according to the will. In *Jacobson* v. *Williams* (*b*), where the husband, before he had received his wife's fortune, became bankrupt, it was held, that the assignees should not receive it without making some provision for the wife. And although when a husband becomes bankrupt, all such property of the wife as he could assign or release passes by the commissioners' assignment to the assignees, *Miles* v. *Williams* (*c*), yet they take it subject to the equity of providing for the wife: *Bosvil* v. *Brander* (*d*), *Ex parte Coysegame* (*e*). In *Bosvil* v. *Brander*, where a

(*a*) 2 *Vern.* 96.
(*b*) 1 *P. Wms.* 382.
(*c*) 1 *P. Wms.* 249.
(*d*) 1 *P. Wms.* 458.
(*e*) 1 *Atk.* 192., more fully reported in *Cooke's Bankrupt Laws*, 283.

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feme sole mortgagee in fee married, and the husband became bankrupt, though the Master of the Rolls held that the assignees of the bankrupt were entitled to the mortgage, yet he held that it would have been otherwise, if, by articles before marriage, it had been agreed that this mortgage money should continue in the wife as her provision, and should be assigned in trust for her. So, in *Tyrrell* v. *Hope* (*a*), where a husband before marriage, and when the settlements were about to be executed, gave a note in writing under his hand that his intended wife should take and receive a moiety of a certain estate to her sole and separate use, as if the same had been so settled by the deed, it was held that the wife was entitled as against the assignees of the husband, who had become bankrupt. It is clear, therefore, that the wife's separate estate does not pass to the husband's assignees; and the husband is to be deemed a trustee for his wife (*b*) in respect of property accruing to her, in case no other trustee be appointed.

It is true, the language of the insolvent debtor's act, 7 *G.* 4. *c.* 57. *s.* 11., is very general and comprehensive; the "prisoner shall, at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee of the said court, in such form as is to this act annexed, of all the estate, right, title, interest, and trust of such prisoner in and to all the real and personal estate and effects of such prisoner, both within this realm and abroad, (except the wearing apparel, bedding, and other such necessaries of such prisoner and his or her family, and the working tools and implements of such prisoner, not exceeding in the whole the value of 20*l.*,) and of all future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects within this realm or

(*a*) 2 *Atk.* 558. (*b*) 2 *Roper*, 151. 1 *Montag.* 446.

abroad

abroad which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him or her before he or she shall become entitled to his or her final discharge in pursuance of this act, according to the adjudication made in that behalf; or in case such prisoner shall obtain his or her discharge from custody without any adjudication being made in the matter of his or her petition, then before such prisoner shall be at large and out of custody; and of all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid; and such conveyance and assignment so executed as aforesaid, in form aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee." But the general words of the act must be restrained to effect the intention of the legislature, and no more; as general words in a will, though sufficient to carry a mortgage estate, will not pass such mortgage estate if the devise contain limitations incompatible with its passing: *Galliers* v. *Moss.* (*a*)

Jones Serjt., *contrà*, was stopped by the Court.

PARK J. The Court entertains no doubt on this case. The argument has turned rather on what might have been the effect of a devise to the separate use of the female, than on the language actually employed by the testator. I do not impeach the principle, that trust property does not pass to the assignees of an insolvent debtor; but there is nothing in these pleadings to shew that any trust was raised in the insolvent. The testator

(*a*) 9 *B.* & *C.* 267.

leaves

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leaves annuities of 20*l.* a year to two female servants, provided they continue to live with his sister: one of the devisees marries during the testator's life, upon which, by a codicil, he leaves the annuity for her sole and separate use; but the other, who did not marry till after the testator's death, takes under the will, in which there is no such restriction of the devise to her separate use, and the property passes to her husband in the ordinary way.

GASELEE J. I do not see how we can distinguish this from a freehold estate of the wife's, in which the husband would, during their joint lives, have a benefit which would pass to the assignees.

BOSANQUET J. It is true that a mere trust estate does not pass to the assignees of the insolvent; but can we see that this is a trust, or other than a beneficial interest in the husband? The will does not subject the devise to any restriction.

ALDERSON J. I am of the same opinion. Whether or not there may be any equitable interest in the wife as against the creditors a court of equity may decide; but no separate interest which a court of law can recognise appears upon these pleadings. In *Rex* v. *Toddington* (*a*) *Holroyd* J. says, "Where there is a conveyance to uses not executed, or on trusts stated on the face of the deed, the one party has the equitable, and the other the legal estate; and in these cases, for collateral purposes, a court of common law will take notice of such an equitable estate. An equitable estate, however, is very different from an equitable right to have a conveyance of the legal estate."

Judgment for the Plaintiff.

(*a*) 1 *B.* & *A.* 564.

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SIMPSON *v.* RACKHAM.

June 1.

Plaintiff and Defendant being partners, and Defendant being indebted to Plaintiff on a separate account, it was agreed between them that Plaintiff should take 2½ per cent. interest on his separate account for six months, from *March* 1st 1827, and 5 per cent. afterwards; that the partnership accounts should be made up, and the Defendant's share of the proceeds go towards the liquidation of his separate debt; that the Plaintiff should receive sums due to the firm, discharge partnership debts, and apply the balance towards discharging the Defendant's separate debt; that the partnership might be dissolved any 1st of *January* on six months' notice being given, but that in consequence of the Plaintiff's concessions as to interest, it was expected there should be no dissolution on 1st of *January* next ensuing:

Held, that this agreement did not suspend the Plaintiff's right to sue the Defendant for the separate debt due from him to the Plaintiff.

THE Plaintiff and Defendant in this case were partners as attornies and solicitors; and there were various accounts subsisting between them relative to several different terms of partnership in which they had been engaged. Independently of these partnership accounts, there was a separate account of monies due from the Defendant to the Plaintiff. To recover the balance of this separate account the present action was brought, in which a verdict was found for the Plaintiff at the last *Norfolk* assizes for the sum of 5950*l.* 18*s.* 10*d.*; with leave for the Defendant to move to set it aside and enter a nonsuit, if the Court should be of opinion that the right of the Plaintiff to recover this balance had been suspended by any agreement between the parties.

Three agreements were given in evidence at the trial. The first, dated the 9th of *March* 1827, was contained in certain answers made by the Plaintiff to proposals of the Defendant, and agreed to by both parties. By those answers the Plaintiff agreed to accept a gross sum of 1300*l.* for interest on the account delivered, (that is, the separate or private account,) to be forthwith made up to the 1st of *March* 1827; and no interest was to be claimed by the Defendant for money in the Plaintiff's hands on the partnership account.

The Plaintiff further agreed that he would be content to accept 2½ per cent. for interest on the same

private

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private account from the same 1st of *March* for six months; but that after that period the rate of interest should be at 5 per cent.

It was then agreed that the share of the Defendant of the partnership money then in the Plaintiff's hands, on account of certain periods of seven years and ten years then making up, should be applied in liquidation of the balance of the private account; but that all the bills to be received should be taken by the Plaintiff, and applied, in the first place, to discharge the agents' bills, and any other claims on the partnership account, and then in discharge of the balance due from the Defendant to the Plaintiff.

The Plaintiff then consented that certain business arising out of his offices of town-clerk and clerk of the peace should be brought into the partnership account; that the Defendant should be allowed to draw for certain sums to a considerable amount, which were to be settled at the end of each year; that from the 1st of *March* the former proportions of profits should cease, and the business be equally divided, the Plaintiff being allowed to charge 100*l.* per annum for rent, taxes, &c. That the Plaintiff should, in consequence, be paid interest at the rate of 5 per cent. on the advances to the Defendant before mentioned; that monies advanced by either party to the partnership should be repaid at 5 per cent.; that the partnership might be dissolved on any 1st of *January*, by either party giving six months' notice: but that the concessions respecting the interest and otherwise must be considered to be made by the Plaintiff in the expectation that the partnership should not be dissolved on the 1st of *January* then next.

The second agreement of the 17th of *April* 1828 was no further material than as it recognized the right of the Plaintiff to retain the Defendant's share of the partnership monies under the agreement of the 9th of *March* 1827.

On

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On the 11th of *August* 1828 an agreement was entered into between the parties, by which it was provided that the partnership should be dissolved on the 1st of *September* then next, and provision was made for completing the accounts to the 1st of *March* 1827, by certain persons therein named; if any difference should arise between them respecting the accounts, the disputed points were to be referred to a barrister, whose determination was to be conclusive; and the balance which might appear to be due to the Defendant was to be carried to his credit on the private account. The partnership account, from the 1st of *March* to the dissolution, was to be examined in like manner, and the Plaintiff repaid his advance with interest at 5 per cent. on the bills to be received.

It was then provided, that the Defendant should immediately proceed to complete all the partnership bills and accounts up to the time of the dissolution, pursuant to the agreement of the 9th of *March* 1827; that the Plaintiff should be at liberty to approve of all, and to make out any, bills which he might think proper; that the Defendant's share of all the money to be received should be carried to the credit of his private account until that account should be discharged, when the money was to be divided between the parties according to their respective shares; and that the Defendant should be allowed for his trouble, and for clerks and incidental expenses, 4 per cent. on the gross amount received, to be paid or allowed to him out of the partnership assets.

There was a provision for allowing 250*l.* to the Defendant on his private account, in satisfaction of his demand for extra trouble.

And, lastly, it was provided, that nothing contained in that agreement should in any manner alter or affect the agreement entered into on the 9th of *March* 1827, but

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but that the same should in all respects be fully performed.

The partnership accounts remained unsettled at the time of the action.

A rule *nisi* having been obtained, pursuant to leave reserved at the trial, to set aside the verdict for the Plaintiff and enter a nonsuit, on the ground that by the terms of these agreements the Plaintiff was precluded from suing in respect of his private account till the balance resulting from the partnership account should have been ascertained,

Taddy and *Bompas* Serjts., who shewed cause, contended that there was nothing in the agreements to indicate any suspension of the Plaintiff's right to sue in respect of his private account. It was clear he might have sued for that in 1827. The partnership accounts were then unsettled; they continued unsettled; and so might continue for a long time to come; but because the Plaintiff had consented to put them in a train of settlement, his rights on the private account were not postponed or varied, and the agreements disclosed no consideration for his relinquishing any portion of such rights.

The stipulation, that any balance forthcoming on the partnership account should be applied in discharge of the Defendant's private account, was meant only to apply to the possible case of the state of the partnership account being at once or speedily ascertained.

Jones Serjt. *contrà*. It never could have been the intention of the parties that the Plaintiff should receive and retain the large sums on the partnership account contemplated by the agreement of the 9th of *March*, or that he should receive 2½ per cent. on his private account for six months at least, and yet be permitted instantly

instantly to sue the Defendant. The stipulation, that the balance of the partnership account should be applied in discharge of the sum due on the private account, is incompatible with a right to sue on the private account before the partnership balance is ascertained; and there is sufficient consideration for such a stipulation, inasmuch as it was beneficial to both parties that their affairs should be so arranged, and the necessity of cross suits be avoided. There is also a further consideration in the agreement to pay interest.

Till the partnership accounts should be closed, it would be impossible for the Plaintiff to specify the amount for which he should enter judgment; and the Defendant would be placed on an unequal footing, inasmuch as it would be impossible for *him* to sue for the partnership balance till the partnership had been concluded. A partner cannot so much as file a bill for an account without consenting to a dissolution of partnership. *Forman* v. *Homfray* (*a*), *Waters* v. *Taylor*. (*b*) But *Tatlock* v. *Smith* (*c*) shews that the right of a creditor to sue may be suspended by an agreement with the debtor incompatible with an instant suit on the part of the creditor. In that case, by an agreement between defendants and their creditors, all defendants' stock in trade was placed in the hands of trustees for the benefit of the creditors; and the defendants were to execute to the trustees a conveyance of all their estate, in which deed were to be inserted all other usual clauses: the trustees carried on defendants' business, and paid the creditors 10*s.* in the pound: they then tendered for execution by defendants a conveyance of all their estate, containing a clause of release, which the defendants objected to as insufficient, and refused to execute the conveyance. The instrument not having been executed by all the cre-

(*a*) 2 *Ves.* & *B.* 329. (*b*) 15 *Ves.* 10. (*c*) 6 *Bingb.* 339.

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ditors, a meeting, at which the defendants were called on to execute, was adjourned, that the signature of every creditor might be obtained; and it was held, that the plaintiffs, who, as creditors, were parties to the above agreement, could not sue for their original debt, at least till the conveyance, such as it was, had been executed by all the creditors, and refused by the defendants. So in *Stracey* v. *The Bank of England* (*a*); certain stock of the plaintiffs was transferred under a forged power of attorney; the Bank of *England* offered to replace the stock, if the plaintiffs would first prove the amount under a commission of bankruptcy issued against a firm in which the forger of the power had been a partner; after this offer the plaintiffs received a dividend, and engaged to tender a proof of their demand under the commission of bankruptcy: it was held, that they could not sue the Bank in respect of the stock till they had fulfilled their engagement to tender the proof under the commission of bankruptcy.

Cur. adv. vult.

PARK J. (*b*) This case was tried before my brother *Gaselee*, and there was a verdict for the Plaintiff. It now comes before us, upon a motion to set aside that verdict and to enter a nonsuit.

The Plaintiff and Defendant in this case were partners, as attornies and solicitors, and there were various accounts subsisting between them relative to several different terms of partnership in which they had been engaged. But, independently of these partnership accounts, there was a private account of monies due from the Defendant to the Plaintiff. To recover the balance of this separate account the present action was brought, in which a verdict has been found for the Plaintiff for the sum of

(*a*) 6 *Bingh.* 754.

(*b*) *Tindal* C. J. was in the Court of Chancery when the case was argued.

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5950*l.* 13*s.* 10*d.*; and the only question now to be considered is, whether the right of the Plaintiff to recover this balance has been suspended by any agreement between the parties? Unless some agreement to this effect can be shewn, the Plaintiff's right to recover must be admitted.

Three agreements have been referred to. The first, dated the 9th *March* 1827, is contained in certain answers made by the Plaintiff to proposals of the Defendant, and agreed to by both parties. The Plaintiff, in the first place, agrees to accept a gross sum of 1300*l.* for interest on the account delivered (that is, the private account), to be forthwith made up to the 1st *March* 1827; and no interest is to be claimed by the Defendant for money in the Plaintiff's hands on the partnership account.

This is a mutual stipulation, in which it must be supposed that the parties considered and acted upon their own views of their respective rights.

The Plaintiff next agrees, that he will be content to accept 2½ per cent. for interest on the account (that is, the same private account), from the same 1st *March*, for six months, and that after that period the rate of interest shall be at 5 per cent. No difficulty appears to have been expected to arise on the items of the account; but it is agreed, that if there should be any, it should be referred to Mr. *Unthank*.

Some difference having arisen upon certain items of the account, they were referred to Mr. *Unthank*, who ascertained the balance. By the stipulations above mentioned, the sum to be received for interest to the 1st *March*, and the rate of interest which the account was afterwards to bear, are ascertained; but there is no provision by which the Plaintiff is restrained from calling for his debt, with interest according to the stipulated rate, or the Defendant from paying it, with interest at

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such rate, according to the convenience of the respective parties. The agreement then goes on to say, that the share of the Defendant of the partnership money then in the Plaintiff's hands, on account of certain periods of seven years and ten years then making up, should be applied in liquidation of the balance, viz. of the private account; but that all the bills to be received should be taken by the Plaintiff, and applied, in the first place, to discharge the agent's bills, and any other claims on the business account, and then in discharge of the balance due from the Defendant to the Plaintiff.

The effect of this stipulation appears to be, to provide that all claims upon the partnership shall first be discharged before either party shall have any claim upon the funds, and that no part of the surplus shall be paid over to the Defendant till the whole of his private debt to the Plaintiff shall have been paid; a stipulation which appears to be reasonable enough, it being apparent that the Defendant was largely indebted to the Plaintiff.

The Plaintiff then consents that certain business arising out of his affairs of town-clerk and clerk of the peace shall be brought into the partnership account; that the Defendant shall be allowed to draw for certain sums to a considerable amount, which are to be settled at the end of each year; that from the 1st of *March* the former proportions of profits shall cease, and the business be equally divided, the Plaintiff being allowed to charge 100*l.* per annum for rent, taxes, &c.

That the Plaintiff shall in consequence be paid interest at the rate of 5 per cent. on the advances to the Defendant before mentioned; and that monies advanced by either party to the partnership shall be repaid at 5 per cent. That the partnership may be dissolved on any 1st of *January* by either party giving six months' notice: but that the concessions respecting the interest, and otherwise, must be considered to be made by the Plaintiff

tiff in the expectation that the partnership be not dissolved on the 1st of *January* then next.

The second agreement of the 17th *April* 1828, is no further material than as it recognizes the right of the Plaintiff to retain the Defendant's share of the partnership monies under the agreement of the 9th *March* 1827.

On the 11th *August* 1828 an agreement was entered into between the parties, by which it was provided that the partnership should be dissolved on the 1st of *September* then next; and provision is made for completing the accounts to the 1st *March* 1827 by certain persons therein named: if any difference should arise between them respecting the accounts, the disputed point was to be referred to a barrister, whose determination was to be conclusive, and the balance which might appear to be due to the Defendant was to be carried to his credit on the private account: the partnership account from the 1st of *March* to the dissolution was to be examined in like manner, and the Plaintiff repaid his advances with interest at 5 per cent. on the bills to be received: it was then provided that the Defendant should immediately proceed to complete all the partnership bills and accounts up to the time of the dissolution, pursuant to the agreement of the 9th *March* 1827, and that the Plaintiff should be at liberty to approve of all and to make out any bills which he might think proper, and that the Defendant's share of all the money to be received should be carried to the credit of his private account until that account should be discharged, when the money was to be divided between the parties according to their respective shares; and the Defendant was to be allowed for his trouble, and for clerks and incidental expenses, 4 per cent. on the gross amount received, to be paid or allowed to him out of the partnership assets.

This agreement contemplates the case of the Defend-

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ant, after the dissolution, completing the accounts to that time, and provides as before, that he shall not be entitled to take to himself any part of his share of the partnership money till he shall have discharged the amount of his debt to the Plaintiff on the private account.

There is a provision for allowing 250*l.* to the Defendant on his private account in satisfaction of his demand for extra trouble.

And, lastly, it is provided that nothing contained in that agreement shall in any manner alter or affect the agreement entered into on the 9th *March* 1827, but that the same shall in all respects be fully performed.

These agreements are not so accurately and perspicuously drawn as perhaps they might have been; and, therefore, they have obliged us to take a very deliberate consideration of them.

At first view it seemed difficult to say, that the parties could have intended that the Plaintiff should be at liberty to maintain an action against the Defendant as soon as the deed of *March* 1827 was entered into, and yet to retain and receive such large sums of money to be applied in liquidation of the demand; and a greater colour also was given to such a doubt, because, by the stipulation of interest at 2½ per cent. for six months, it seemed probable that it was in the contemplation of the contracting parties to suspend any proceeding at law for *that* period at least.

And one of my learned brothers has still some little difficulty; but those doubts are not sufficient in his judgment to induce him to come to a different conclusion from the rest of the Court.

For, on the other hand, it is certainly quite clear that there is no precise stipulation for a suspension; and, therefore, how can the Court say to *what period* that suspension should extend?

The

The stipulation also, that the Defendant's share of the partnership assets, when received by the Plaintiff, should go in discharge of the *private* debt, is an *advantage* to the Defendant, for it gives to him a legal set-off to that extent: whereas, without such stipulation, the Plaintiff might have sued for the *whole private debt*, and left the Defendant to a suit in equity to recover his share. This seems another reason for not considering any thing in the agreement as amounting to a suspension.

If then the agreement of the 9th *March* 1827 did not amount to a stipulation to suspend the Plaintiff's right to sue on the private account, there seems to be no ground for contending that the last agreement of the 11th *August* 1828 had that effect.

The effect of both these agreements, so far as regards the private account, seems to be, to ensure to the Plaintiff the right to have the Defendant's share of the partnership monies, whenever ascertained, applied in discharge of his separate claim upon the Defendant, in consideration of certain concessions made by the Plaintiff, without restricting the right of the Plaintiff to enforce his claim by action whenever he should think fit to resort to that remedy. And any delay which may have been occasioned in making up the partnership accounts, and ascertaining the Defendant's share of the partnership monies, will not afford any legal ground for suspending the Plaintiff's right of action for his separate debt.

If this be, as we think upon full consideration it is, the right view of the case, the rule must be discharged.

Rule discharged.

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June 3. WHITAKER *v.* TATHAM.

1. An executor cannot take the residue of a testator's property for his own benefit, where the will contains a specific bequest to him for his care and trouble.

2. Parol evidence of a testator's declarations can only be received to shew what his intentions were at the time of making his will.

3. Such evidence of declarations in favour of giving the residue to the executor, cannot be received where the will contains a specific bequest to the executor.

THE action which formed the basis of the following order of reference and award was brought by the Plaintiff against the Defendant as the surviving executor of *Randal Wallworth*, to recover a debt alleged to be due from the testator.

At the time the action was tried there was a suit pending in the Court of Chancery, in which Mrs. *Jane Dawkins* was Plaintiff, who claimed a distribution of the residue of the testator's property. That suit was also made a subject of the reference, and Mrs. *Jane Dawkins* was made a party to the order by consent.

The principal question to be determined by the Court was, whether the arbitrator's award, "That the said *Jane Dawkins* is not entitled to such residue, or to call upon the said Defendant for any account of the same," was right?

The arbitrator found and declared, that *Randal Wallworth* did, on the 14th of *June* 1823, duly make and publish his will in writing, executed so as to pass real estates; and on the 6th of *December* 1824 executed a codicil to the will, which will and codicil were as follows:— "I, *Randal Wallworth*, give, devise, and bequeath to my executors hereinafter named all my real and personal estate, upon trust that they, my said trustees, or the survivor of them, do and shall, with all convenient speed after my decease, satisfy and discharge my just debts and funeral and testamentary charges, and also pay unto my executors the sum of 20*l.* each for the trouble they will have in the execution of this my will; and then, upon trust out of the dividends and interest of the said trust-monies, to pay unto

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unto my daughter *Jane Dawkins*, wife of *Nathaniel Dawkins*, for and during the term of her natural life, one annuity or yearly sum of 46*l.* clear of all deductions whatsoever, by half-yearly equal payments, the said annuity not to be subject to the control or engagements of her present or any future husband, and her receipt only to be a sufficient discharge to my trustee or trustees for the same; the said sum of 46*l.* per annum to be paid out of 1000*l.* new 4 per cent. annuities; and 6*l.* per annum out of long annuities now standing in my name in the books of the governor and company of the Bank of *England*. And I do declare, that if she the said *Jane Dawkins* sells or attempts to sell the said annuity, or any part thereof, I direct the same shall cease and be no longer payable. And it is my further wish that the said stock be transferred into the names of *Charles Todd*, *William Henry Tatham*, and *Robert Whitaker*, as trustees for the said annuity; and it is my further wish, that in case *Nathaniel Dawkins* survives his present wife, my daughter *Jane Dawkins*, that they, my hereinafter-named executors, do pay unto the said *Nathaniel Dawkins* the sum of 200*l.* as a free gift. And it is my further wish, that in case of the demise of the said *Jane Dawkins*, the remainder of my funded property in the new 4 per cent. annuities and long annuities, after deducting the gift of 200*l.*, be divided amongst my great grandchildren at my demise in equal proportions, at the discretion of my executors. And I further desire, that my house that I now live in, situated at *Barnet*, and the shares I now hold in the *Hope* fire office, be disposed of for the purpose of settling my just debts and demands, as mentioned in the former part of this my will; and if there should be any money remaining, my wish is that my executors do dispose of it agreeably to their own discretion. Lastly, I do

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do hereby nominate and appoint my friends *Charles Todd* of *Islington, Middlesex*, gent., and *William Henry Tatham* of *Islington*, gent., my executors of this my last will and testament for the purposes herein expressed, revoking all former wills and dispositions by me made. In witness whereof," &c.

Codicil:—" This is my request, that my daughter, Mrs. *Dawkins*, is at my decease to have my night-table, coal-box, dining-table, and watch; my granddaughter, *Jane Whitaker*, to have both chests of drawers that stand in my bed-room and the passage, and likewise my book-case; and all the rest of the furniture, and whatever remains in the house, to belong to Mrs. *Hughes*."

The said *Randal Wallworth* died on the 23d of *January* 1825, without altering or revoking his said will, except as to the said codicil.

The said *Nathaniel Dawkins* died before the commencement of the said suit in equity, or the said action in the Court of Common Pleas; and the said will and codicil were proved on the 1st of *March* 1825, by the said *William Henry Tatham* and *Charles Todd*, the executors therein named.

The said *Jane Dawkins*, at the time of the death of the said *Randal Wallworth*, was, and from thenceforth hitherto had been, the next of kin to the said *Randal Wallworth*; and the several matters and things mentioned in the said codicil were, before the commencement of the said suit in equity or of the said action, delivered by the said executors to the several persons to whom the same were respectively bequeathed by such codicil.

The said *Randal Wallworth*, on several occasions after the making the said will, and on the last occasion within a very few days of his death, declared it to be his will and intention that the said executors in the said will named

named should have and take the residue of his property, after satisfying the bequests made in and by the said will and codicil, to and for their own benefit.

The arbitrator then found,

That the executors in the will named were, by the terms of the will itself, entitled to take and retain the said residue to and for their own use and benefit, and also by the intention of the said *Randal Wallworth* as declared in manner aforesaid; and that the said *Jane Dawkins* was not entitled to such residue, or any part thereof, or to call upon the said *William Henry Tatham* for any account of the same.

But if the Court should be of opinion that the next of kin to the said *Randal Wallworth* was, upon the facts stated in the award, entitled to the residue of the property of *Randal Wallworth* undisposed of by the will and codicil, or either of them, in such case the arbitrator awarded and ordered, that the said *William Henry Tatham* should, within two calendar months next after the Court should have so decided and adjudged, pay to the said *Jane Dawkins* so much of the residue as should remain after deducting the costs and charges of the said *William Henry Tatham* by him incurred in and about the said suit in equity; and also his costs in the above-mentioned application, and of the reference and award.

The questions for the opinion of the Court were,

First, whether the arbitrator ought to have received parol evidence under the will of the testator: and, secondly, whether, under the terms of the will, Mrs. *Dawkins*, as next of kin, was entitled to the residue of his estate, or whether it belonged to the executors.

Taddy Serjt., on the part of the Plaintiff, having obtained a rule *nisi* to enter up judgment pursuant to the award,

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Storks Serjt., on the part of the Defendant, shewed cause.

The will is sufficiently clear to shew that the testator intended to bequeath the residue of his property to the executor for his own use; and if not, at all events evidence was properly received to shew that such was his intention, which that evidence places beyond doubt.

The executor is *primâ facie* entitled to all personal property not disposed of by the will: it lies on the other side, therefore, to shew how the property has been disposed of. It will be said, that where a specific legacy is left to an executor for his trouble, he cannot take a beneficial interest in the residue; for the specification of a part is incompatible with an intention that he should have the whole. But in *Gibbs* v. *Romney* (*a*), where the residue, as in the present case, was left in the disposition of the executors after a specific bequest to them, the Master of the Rolls determined that neither the heir nor the next of kin had a right to call upon the executors to account for this residue.

If the testator here had intended that the executor should have no more than the legacy for his trouble, he would not by the codicil have taken a portion out of the residue to bequeath to his next of kin. In *Bowker* v. *Hunter* (*b*), the Lord Chancellor says, "In order to make a gift of part a bar to taking the residue, the general gift must make the intent as clear as the other intention is from making him executor; where it will bear no other intent, it will not bar him from taking the residue. The fundamental distinction is established by laying it down that the rule, *that the executor shall take the residue*, must prevail, unless there is an irresistible inference to the contrary."

(*a*) 2 *Ves. & B.* 294. (*b*) 1 *Br. C. C.* 328.

So,

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So, in *Dicks* v. *Lambert* (*a*), the Master of the Rolls said, "It is now so perfectly settled, that it is unnecessary to repeat the rule, that making an executor does vest in him the personal estate of the testator, unless a reasonable ground appears upon the will, or a strong and violent presumption, that the testator did not intend by making that executor to vest in him the residue."

In *Clennell* v. *Lewthwaite* (*b*) it is also laid down, that an executor is entitled to an unbequeathed residue, unless there is a strong and violent presumption against him. And a specific legacy to the executor, where the inference to be drawn from it is rebutted by the contents of a codicil, does not afford so strong and violent a presumption as to deprive the executor of his right to the residue.

Then, *Williams* v. *Jones* (*c*) is a decisive authority to prove that parol evidence was properly admitted to shew the testator's intention. In that case, one of the executors having a legacy for his trouble, parol evidence was admitted on behalf of his co-executrix, an infant, to rebut the presumption for the next of kin; and she was held entitled to the residue undisposed of.

Taddy Serjt. *contrà.* The will excludes the executor from any beneficial interest in the residue, and the parol evidence has been improperly admitted. It is a clear principle, to which there is no exception, that an executor can take no beneficial interest in the residue, under a will which contains a legacy to him for his care and trouble; because the testator cannot be considered to have given all where he has specified that the legatee shall take only a part. *Foster* v. *Munt* (*d*),

(*a*) 4 *Ves.* jun. 728.
(*b*) 2 *Ves.* jun. 465.
(*c*) 10 *Ves.* jun. 77.
(*d*) 1 *Vern.* 473.

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Ratchfield v. *Careless.* (*a*) Those decisions have been acted on ever since: as, in *Nourse* v. *Finch* (*b*); where *Buller* J. said, "It is a principle in equity, that if a legacy is given to an executor, that shall exclude him from the residue, unless an intent appears that he shall take it;" in *Clennell* v. *Lewthwaite*; where it was laid down that an executor is entitled to an unbequeathed residue unless there is a strong and violent presumption against him, but that a legacy to him afforded such presumption; and in *Williams* v. *Jones*, which contains a remarkable confirmation of the rule, in the case of *White* v. *Evans* there cited, in which a legacy for his care and trouble having been bequeathed to one of two executors, the Master of the Rolls held that both were excluded from any beneficial interest in the residue. The circumstances in *Gibbs* v. *Romney* were very peculiar; and the Court decided on the ground that the bequest operated as a power of appointment, and not as a mere gift of the residue.

The bequest in the present will, however, is at all events only a bequest of the residue arising out of the proceeds of a certain house, and not a bequest of the general residue.

With respect to the admission of parol evidence to explain the testator's intention, although there is great conflict among the cases, they all agree in one point, namely, that the evidence should be confined to declarations indicative of his intention at the time of making the will, and not extended to declarations which may shew what his intention was at a subsequent time. To admit such evidence would be, in effect, to supplant a written by a nuncupative will. In *Rachfield* v. *Careless* the evidence was so restricted: so in the *Duke of*

(*a*) 2 *P. Wms.* 158. (*b*) 1 *Ves.* jun. 359.

Rutland

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Rutland v. *The Duchess of Rutland* (*a*), where the Chancellor said, "After all, I own that the allowing parol evidence is exceedingly dangerous, and not to be done in case of discourses at a different time from that of making the will." So, in *Nourse* v. *Finch*, where all the authorities are considered by *Buller* J., who said, "If this was a new question, I should reject the parol evidence *in toto*; for it is very mischievous, and words easily admit of a colour." [*Bosanquet* J. In *Trimmer* v. *Bayne* (*b*), Lord *Eldon* said, "These parol declarations are all alike admissible, whether consisting of conversations with people who have nothing to do with it, people making impertinent enquiries, and drawing from him angry answers, or in whatever form, — they are all evidence. But they are entitled to very different credit and weight, according to the time and circumstances."] Declarations made subsequently to the will, if admissible at all, are only admissible in so far as they refer to the intentions which existed at the time of making the will. That distinction is taken by the Master of the Rolls in *Langham* v. *Sandford* (*c*), where he says, "If it be by any medium of proof sufficiently ascertained what the actual intention was at the time of executing the will, it is immaterial what a testator may, for any reason, have thought proper at a subsequent period to declare his intention to have been."

TINDAL C. J. In this case we are called upon to decide on the construction of the will of *Randal Wallworth*, and the reception of parol evidence to explain it; and the question is, whether Mrs. *Dawkins*, as next of kin, is entitled to the residue of the testator's property; or whether it belongs to the Defendant as executor. As a general rule it must be admitted, that all the testator's

(*a*) 2 *P. Wms.* 215. (*b*) 7 *Ves.* 518. (*c*) 17 *Ves.* 453.

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personal property vests in the executor; and from an early period, down to the time of the decision in *Foster* v. *Munt*, it was held, that the executor was entitled to retain the residue, where not otherwise disposed of, notwithstanding the will contained a specific legacy to him for his care and trouble in discharging the duties of executor. But from the period of that decision it has been holden, that where the will contains a specific legacy to executors for their care and trouble, they are, as to the residue, trustees for the next of kin. And this rule is founded on reason and good sense; for it would be absurd to leave a specific legacy of a part to one who should be entitled to take the whole; or to leave a legacy for the care and trouble of collecting a residue, the benefit of which should accrue to the legatee. The words of this will are, "I bequeath to my executors the sum of 20*l.* each for the trouble they will have in the execution of this my will." After other legacies, the testator desires that the house he lives in, and his shares in the *Hope* Fire Office may be disposed of for the purpose of settling his debts, and if there should be any money remaining, he adds, "my wish is, that my executors do dispose of it agreeably to their own discretion."

The ground on which we are called on to say that the rule established in *Foster* v. *Munt* does not apply to this case is, that the testator's intention has been ascertained by parol evidence, and that there is, in effect, an express legacy of the residue to the executors, as well as of the 20*l.* bequeathed at the outset of the will.

First, as to the parol evidence. Many of the cases which have been cited shew that such evidence is not to be admitted where there is a specific legacy to the executors for their care and trouble in the execution of the will; such a legacy affording an irresistible presumption that it was not intended the executors should

should have the whole: *Clennell* v. *Lewthwaite*: but such evidence, when admitted, has always been admitted with caution, and restrained to proof of what was the testator's intention at the time of making the will. If it had not been so restrained,—if evidence had been admitted of his declarations of intention at subsequent periods, greater effect would have been given to a nuncupative than to a written and attested will. Although, therefore, we may receive evidence of a testator's declarations, it must be confined to such as bear upon his intentions at the time of making his will. In the present case the declarations appear to have been made at a subsequent period; but it is unnecessary for us to come to any decision as to their admissibility, because they are altogether excluded by the specific legacy for the executors' trouble.

We come, then, to the question, whether, upon this will, there is any specific bequest of the residue to the executors. The words are, "I desire that my house that I now live in, and the shares I now hold in the *Hope* Fire Office, be disposed of for the purpose of settling my just debts and demands, as mentioned in the former part of this my will; and if there should be any money remaining, my wish is, that my executors do dispose of it agreeably to their own discretion." But we can only apply this to the residue arising upon the sale of the house, and shares in the *Hope*, and not to the general residue; and the rather, because there is before, a bequest of the whole of the testator's personal estate to discharge debts and testamentary expenses. With respect to the partial residue remaining on the sale of the house and shares in the *Hope*, we feel it so difficult to distinguish this case from *Gibbs* v. *Romney*, that we consider the executors entitled to it.

The next of kin, therefore, will take the general re-

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sidue, and the executors the residue accruing from the sale of the house and shares in the *Hope* Insurance.

PARK J. I rely on the well-established rule, which has been acted on ever since the decision in *Foster* v. *Munt*, that executors cannot take the residue for their own benefit where there is a specific legacy to them for their care and trouble in the execution of their office; and, likewise, that parol evidence to explain a testator's intentions as to the executor has always been excluded where the executor takes a specific bequest. I agree with Mr. Justice *Buller* in thinking it would have been better that parol evidence had never been admitted; such evidence, however, has always been received, subject to the restriction that it must relate to the intention of the testator at the time of making the will. The declarations in the present case refer rather to his intentions at a subsequent period, and in that view were clearly not evidence. But there is sufficient on the will itself to shew that the testator did not intend the general residue to be applied for the benefit of his executors.

GASELEE J. concurred.

BOSANQUET J. I entirely agree in the exposition of the principles by which this case is governed. The first question is, whether the executors take the general residue by any express bequest. The testator bequeaths to them all his personal property in trust to discharge his debts and testamentary expenses, together with 20*l.* to each of them for their trouble in the execution of the will, and then in trust to discharge various legacies. He then desires that his house and shares in the *Hope* Insurance be disposed of to settle his debts as mentioned in the former part of his will, and if there should

should be any money remaining, that his executors should dispose of it agreeably to their discretion. The "*money remaining*" must be confined to the money remaining out of the application of the proceeds of the house, and *Hope* shares. But the question is, whether, besides that, the general residue of the testator's property is for the executor's own benefit. Now, the former part of the will contains a bequest to them of 20*l.* each for their care and trouble in the execution of the will; and, according to all the authorities, when there is such a specific bequest for their care and trouble, the executors cannot claim for themselves any portion of the residue.

The next question is, whether the strong and violent presumption arising from such a specific bequest can be rebutted by parol evidence of the testator's intentions. And the authorities are clear that it cannot: *Ratchfield* v. *Careless*, *Clennell* v. *Lewthwaite*, *Nourse* v. *Finch*.

In *Nourse* v. *Finch*, *Buller* J. said, "Parol evidence may be admitted in a case of *ambiguitas latens*, of fraud, and perhaps of ignorance or mistake; but it does not follow that it ought to be allowed to prove the intent in any written paper; but that ought to be collected from the paper itself." And in *Clennell* v. *Lewthwaite* the Master of the Rolls said, "It is clear that no parol evidence of an intention afterwards to give it to him will be sufficient; it can be only to shew what was intended at the time he was made executor." It is clear, therefore, that parol evidence is not admissible to rebut the presumption arising from a specific legacy to executors for their care and trouble. But even if it were otherwise, the evidence received in this case was such as ought to have no weight in the interpretation of the will; for though, generally speaking, parol evidence may be received to shew the testator's intention at the time of making the will, yet, consider-

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ing the extreme inconvenience of admitting such evidence at all, it must be confined to declarations indicative of the testator's intention at that time only.

Judgment for the Plaintiff.

June 4.

SIMMONS *v.* NORTON.

1. In an action of waste for ploughing ancient meadow, the Defendant cannot under the general issue, *nul wast*, give evidence that the ploughing was resorted to according to the custom of the country, for the purpose of ameliorating the meadow. If such matter be a defence at all, it must be pleaded.

2. In an action of waste for cutting timber, the Defendant cannot give in evidence, even in mitigation of damages, that the timber was cut for the purpose of necessary repairs, but turning out to be unfit for that purpose, was exchanged for other timber which was applied to the repairs.

THIS was a writ of waste brought by reversioner against tenant for years, for ploughing up ancient meadow land and cutting down timber.

The Defendant pleaded *nul wast*, upon which issue was joined.

At the trial before *Taunton* J., last *Somersetshire* assizes, the defence, as to the ploughing, was, that the meadow had become sour and mossy through age; that it had been ploughed up according to the rules of good husbandry, sown with barley and clover, and laid down to grass again: such a process being occasionally necessary to restore old meadow to a healthy state. The Defendant had also raised a few potatoes on a portion of the land. Some of the witnesses said, that the crop of grass ensuing was better than before, others, that it was as good, and would have been better if lime had been thrown on the land. The Plaintiff proposed to prove further, that it was the custom of the country to restore old meadow land by the process above mentioned, and that he had contracted for lime to be employed in furtherance of his project, but had countermanded the order when

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this action was commenced. The learned Judge thought the whole ought to have been pleaded, and that the defence set up was not available under the general issue. Evidence of the custom was, however, ultimately admitted, though not of the contract for the lime: but the Plaintiff having adduced conflicting testimony as to the custom and the effect of the ploughing, the learned Judge told the jury that the custom had not been proved, and that ploughing up old meadow was waste, whether for the purpose of melioration or not. The jury found for the Plaintiff, with 10*s.* damages.

With respect to the timber, the defence was, that the Defendant had cut down for the purpose of necessary repairs what appeared to him to be likely trees; but that when they were down, they turned out to be unfit for the purpose; whereupon the Defendant, after an application to the guardian of Plaintiff's estate, exchanged them for other timber fit for repairing the premises. The learned Judge, however, rejected evidence of these facts, as they amounted to a species of set-off, which the Defendant could not have pleaded, and a verdict was given for the Plaintiff, 5*s.* damages.

Russell Serjt., in *Easter* term, moved for a new trial, on the ground that it should have been left to the jury to say, whether the ploughing had produced melioration of the meadow; for if such were its effect, it was not waste; and that the evidence with respect to the purchase of the lime, and the application of the timber taken in exchange for the timber felled, ought not to have been excluded. He cited 2 *Roll. Abr.* 814. *pl.* 5. "En tiel lieus lou per le custom del pais l'airer de pree est bon husbandry et pur melioration del pree, la, l'airer de ceo n'est wast:"—*Rennell* v. *Withers*, before *Abbott* J. *Winchester* Spring assizes 1818, (reported in *Manning*'s Index to *N. P. Cas.* 291. tit. *Trespass*,) where it was held, that in

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an action for cutting down trees excepted out of a lease, it might be shewn, *in mitigation of damages*, that the trees were applied towards purposes for which the Plaintiff had covenanted to furnish timber by assignment of his bailiff, if there were sufficient timber on the demised premises; or that they were exchanged for other timber used for those purposes: — and *Doe d. Foley* v. *Wilson* (*a*), to shew that the intention of the defendant in ordering the lime should have been left to the jury, though the lime was unapplied, just as the intention of cutting down trees for repair was left to the jury in that case, though the trees had not been so applied before the action.

A rule *nisi* having been granted,

Wilde Serjt. shewed cause. First, the ploughing was waste, whether it tended to the melioration of the meadow or not; and, secondly, upon this issue, neither the question of melioration nor the custom of the country could properly be left to the jury. Such matters of defence ought to have been pleaded specially.

The passage cited from 2 *Roll. Abr.*, and inserted inaccurately in *Com. Dig. Wast.* (D) 4.,—for the qualification, "*per le custom del pais*," is there omitted, — is at variance with all the other authorities; as *Co. Lit.* 53. *b.* "If the tenant convert arable land into wood, or *è converso*, or meadow into arable, it is waste; for it changeth not only the course of his husbandry, but the proof of his evidence." 2 *Roll. Abr.* 815. *pl.* 8. *Moore*, 101. *Dyer*. 37. *Hob.* 234. 2 *Leon.* 174. *Owen*, 67. *Com. Dig. Wast.* (D) 4. "Or meadow to orchard, though it be melioration." So in *Cole* v. *Greene* (*b*), converting brewhouses to greater value was held to be waste, notwithstanding the melioration, by reason of the alteration of the nature of the thing and the evidence thereof.

(*a*) 11 *East*, 56. (*b*) 1 *Lev.* 309.

But

But at all events this was matter which ought to have been pleaded. Upon *nul wast* the Defendant may give in evidence any thing that proves it to be no waste, as that it happened by tempest, lightning, enemies, or the like; but it is no plea where he has matter of justification or excuse; as that he cut timber for repairs, and used it accordingly, or for necessary botes. *Co. Lit.* 283. *a.* 2 *Wms. Saund.* 238. *n.* 5. *Com. Dig. Pleader*, 3. O. 7. 11, 12. These matters must be pleaded specially: *Dyer*, 276.

As to the exchange of the trees the evidence was properly rejected. It is laid down in *Com. Dig. Wast.* (D) 5. "So it will be waste if he sells trees cut for fuel, and with the money repairs, — or afterwards repurchases and uses for repairs." So in *Co. Lit.* 53. *b.* "The tenant cutteth down trees for reparations, and selleth them, and after buyeth them again, and employs them about necessary reparations, yet it is waste by the *vendition*: he cannot sell trees and with the money cover the house." So in 2 *Roll. Abr.* 829. l. 14. "If lessee cut trees for repairs, and sells them, and buys them back, and employs them on repairs, yet it is waste for the *vendition*."

Between selling and exchanging there is no material distinction; and as to the authority of *Rennell* v. *Withers* the point was little debated, and the learned Judge at first was of a different opinion.

Russell in support of the rule. The position in 2 *Roll. Abr.* 814. pl. 5. is adopted in *Com. Dig. Waste*, (D) 4. and in *Vin. Abr. Wast*, (D) 5., and confirmed by the sanction of those writers. Undoubtedly, converting ancient meadow or pasture into *arable* is waste; and one reason given in several of the cases is, that it changes the *evidence* of the thing, — but this must apply only to a permanent conversion, and not to a *temporary change*, as

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breaking up to lay down again, for this may enure to the benefit of the inheritance. In *Lord Darcy* v. *Askwith* (*a*) it is laid down as "generally true that the lessee hath no power to *change the nature* of thing demised: he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor decay the pale of a park, for then it ceaseth to be a park; nor may he destroy or drive away the stock or breed of any thing, because *it disherits and takes away the perpetuity of succession*, as villains, fish, deer, young spreys of woods, and the like, but he may *better* a thing of the like kind, as by digging a meadow to make a drain or a sewer."

As to the general issue, the plea of *nul wast* admits nothing, but puts the whole declaration in issue. And upon this plea the Defendant may deny what the declaration charges, viz. waste. Waste is any act which is *productive of injury to the reversion*: first, either by changing the evidence, and this may be though the estate be in fact improved; or, secondly, by a permanent deterioration of the estate. If either of these has ensued, it is *waste*, which must be justified or excused (if at all) by a special plea. But an act, which has neither of these consequences, is *not* waste. It does not require to be justified or excused: the act justifies and excuses itself. The averment in the declaration is negatived. It is not waste.

The cutting down a timber tree is *primâ facie* waste, which must be justified or excused. There can be no bettering of the same thing. The tree is gone, and it must be accounted for.

But the law will not allow that to be waste which is not prejudicial to the inheritance. By *Richardson* C. J. in *Barret* v. *Barret*. (*b*) And in all the cases in which,

(*a*) *Hob.* 234. (*b*) *Hetley*, 35.

though

though the estate has been benefited, it has been held notwithstanding to be waste, the reason assigned is the *alteration of the nature of the thing and the evidence*. Upon this ground, the conversion of a corn-mill into a fulling-mill, *City of London* v. *Greyme* (*a*), and the converting a brewhouse of 120*l*. a year into other houses let for 200*l*. a year, *Cole* v. *Greene*, have been deemed waste. So also if the tenant converts arable into wood, or *è converso*, it is waste, for it not only changes the *course of husbandry*, but also the *proof* of *evidence*. (*b*) In the present case neither the course of husbandry nor the proof of evidence is changed.

The same reason is also given in *Co. Lit.* 53. *b*., where it is said that the *conversion* of meadow into arable is waste, for it changes not only the course of husbandry but the proof of evidence. But ploughing *per se* is not waste; for if meadows be sometimes arable, and sometimes meadow, and sometimes pasture, then the ploughing of them is not waste. (*c*)

So in *Bac. Ab. Wast*, (C): "neither is the division of a great meadow into many parcels, by the making of ditches, waste. For the meadows may be *the better for it*, and it is for the profit and ease of the occupiers."

And upon this case in *Bac. Ab. Wast*, (C), is this note, "Some say that ploughing must be prohibited by covenant, for that an *absolute restraint* from ploughing is void."

Then, as to the cutting the trees. Though this, on account of the exchange of the timber, was, perhaps, strictly waste, *Vin. Abr. Wast*, (M), pl. 12, 13., or, at all events, not evidence in *answer* to the action, yet it ought to have been received in mitigation of damages. *Redfern* v. *Smith* (*d*), *Rennell* v. *Withers*. Damages are

(*a*) *Cro. Jac.* 182.
(*b*) 2 *Roll. Ab.* 814.
(*c*) 2 *Roll. Ab.* 815.
(*d*) 1 *Bingh.* 382.

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the great point; because if the value of the waste is not found to be 40*d.*, the tenant is dispunishable; and if damages under that amount be found, judgment may be given for the Defendant. *Co. Lit.* 54. *a. Com. Dig. Wast*, (E) 1. 2 *Saund.* 250. *b.* The case of *Redfern* v. *Smith* shews that the real question is, whether, and to what extent, the reversion has been injured. Merely shewing an act *primâ facie* waste is not sufficient. Even in case of a lease with a proviso for re-entry in case the lessee should commit waste to the value of 10*s.*, it was holden, that the waste contemplated by such proviso was waste *productive of injury to the reversion*; and that it was a question for the jury, whether, under all the circumstances, such waste to the value of 10*s.* had been committed: and because the question had not been so left to them, the Court granted a new trial. *Doe d. Earl of Darlington* v. *Bond.* (*a*)

TINDAL C. J. This was a writ of waste brought by the reversioner against a tenant for years in respect of waste of two kinds: one, converting meadow into arable, the other cutting timber improperly. The general issue *nul wast* was pleaded; and at the trial, it having been proved that the meadow had been ploughed and the trees felled, a verdict was found for the Plaintiff.

A motion has been made to set aside this verdict, on the ground that the learned Judge who tried the cause ought to have left it to the jury to find whether the ploughing had been resorted to to meliorate the land, and that he excluded evidence that the Defendant had exchanged the timber cut down for timber which he employed in the repair of the demised premises. It has been argued that ploughing up meadow is no waste

(*a*) 5 *B.* & *C.* 855.

if

if the land be meliorated thereby, and 2 *Roll. Abr.* 814. pl. 5. has been relied on as an authority to that effect.

It is unnecessary for us to say whether the position there laid down be law to the full extent, because upon this record, as it is framed at present, the evidence was not admissible. It is clearly established by several authorities, that ploughing meadow land is waste (*a*): and one of the reasons given is, that it alters the evidence of title; a reason which I am not disposed to treat lightly. In grants, land often passes specifically, as meadow, pasture, arable, or by other descriptions; and I am not prepared to say that alteration of the surface might not produce a difficulty in the title: it is a matter of daily practice in this Court to amend fines and recoveries on account of mistakes in the description of land, and the ground of such amendments is, that these documents certify the title and identify the land by reference to the uses to which it is applied. Ploughing meadow land is also esteemed waste on another account; namely, that in ancient meadow, years, perhaps ages, must elapse before the sod can be restored to the state in which it was before ploughing. The law, therefore, considers the conversion of pasture into arable as *primâ facie* injurious to the landlord on those two grounds at least. I do not say that that which is *primâ facie* waste may not be altered in its character, if, under particular circumstances, it should appear to have been done for the melioration of the land, but if that be so, it must be expressly stated on the record. In *Com. Dig. Pleader*, 3. O. 7., it is laid down that "the general issue, *no waste done*, may be pleaded in all cases where there is no waste, as if destruction happens by tempest, lightning, enemies, &c.; but it is no plea where the defendant has matter of justification or excuse."

(*a*) *Co. Lit.* 53 *a*. *Dyer*, 37. *Hob.* 234.

Here,

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Here, if the surface of the meadow had been destroyed by the eruption of a moss, or enemies had landed and dug it up, that would have been no waste, but the act of God, or of a hostile force, that *vis major* for which the Defendant is not responsible. But even in such a case, according to the authorities, the injury ought to be repaired as soon as possible. It is sufficient, however, to say, that the general issue applies only to cases where the act complained of is not the act of the party; if it be the act of the party, he must admit and justify it on the record, whenever he has matter of justification to allege; as, that he cut timber for repairs; or pulled down, to rebuild, a house in decay. The act being *primâ facie* waste, the Defendant must shew the object and intent of his proceeding, and give the Plaintiff the opportunity of taking issue on his allegations. If the Defendant here had pleaded that he ploughed the land to meliorate or restore it to its original quality, I am not prepared to say that the authority in *Roll. Abr.* might not have been in his favour; but as he has not so pleaded it, the question could not be submitted to the jury. So, with respect to cutting down the timber, he should have pleaded that he cut it for repairs; and in the absence of such a plea, the evidence on that head was properly rejected. In *Rennell* v. *Withers* it did not appear that the plaintiff had sustained any damage; but here the Defendant was bound to confine himself to fell such trees as were proper for repairs; as he has not so confined himself it must be taken that the Plaintiff has sustained injury, and that there is no ground for disturbing the verdict which has been given in his favour.

PARK J. Ploughing up meadow ground is clearly waste, because it changes the course of husbandry and the evidences of title; and when the waste is the act of the party, any excuse he has to offer must be specially pleaded;

pleaded; it is only where the waste happens by the act of God, or the like, that the general issue is the proper plea. The general principle is clearly laid down in *Barret* v. *Barret*, and though some exceptions are pointed out, yet with respect to the conversion of meadow into arable, no doubt is raised, and *Periam* J. adds, "or into orchard."

I concur with the learned Judge who presided at the trial, in thinking that evidence of the custom of the country ought not to have been admitted under the general issue.

GASELEE J. I see no reason for disturbing this verdict. The authorities are clear, that matter in justification or excuse ought to be pleaded specially.

As to the case of *Rennell* v. *Withers*, I was of counsel in it, and remember that the parties had no wish to carry the case beyond the assizes.

BOSANQUET J. Breaking up ancient meadow is *primâ facie* waste, and any excuse for such an act should have been pleaded specially; the question of melioration, therefore, could not have been left to the jury under this record. As to the trees, although the tenant may fell them for necessary botes, he must at his own peril select such as are fit for the purpose, and employ them accordingly.

Rule discharged.

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June 6.

BROUGH *v.* ADCOCK.

Judgment of nonsuit was signed and execution sued out after a commission of bankrupt against Plaintiff; but the first day of the term, to which the judgment related, was anterior to the commission: Held, that the costs were not a debt provable under the commission, and that the Plaintiff was not entitled to set aside the execution.

A COMMISSION of bankrupt was sued out against the Plaintiff on the 29th of *January*. The Defendant signed judgment as in the case of a nonsuit, and taxed costs on the 9th of *February*.

The costs having been levied of the Plaintiff under a *ca. sa.*,

Taddy Serjt. obtained a rule *nisi* to set aside the execution, on the ground that the costs in question might have been proved under the Plaintiff's commission; for though the judgment was not signed till after the commission, yet it had relation to the first day of the term, which was before the commission, and by that means the costs might be considered as a debt due before the commission.

Wilde Serjt., who shewed cause, objected that the Defendant could not, by virtue of this fiction, swear that the costs were a debt actually due before the commission; and

The Court, after hearing *Taddy* in support of the rule, said, that the case was decided in principle by *Haswell* v. *Thorogood* (*a*), where Lord *Tenterden* said, "The rules deducible from all the cases are laid down in Mr. *Deacon's Treatise on the Law of Bankruptcy*; he says, 'Where a defendant obtains a verdict, and the plaintiff becomes bankrupt before judgment is signed, the costs cannot be proved under the commission, on the principle that no debt arises in such case until judg-

(*a*) 7 *B.* & *C.* 705.

ment

ment is signed, *Walker* v. *Barnes*. (*a*) That is, I think, a correct statement of the decisions upon the subject." The relation of law did not apply to such a case as this: for the Court were bound to enquire on what day the judgment was actually signed.

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Rule discharged.

RICH *v.* WOOLLEY and Others.

June 6.

TRESPASS for breaking and entering Plaintiff's close, breaking open and breaking to pieces the gate and lock, and driving away the Plaintiff's cows and heifers.

The Defendants pleaded, first, the general issue.

Secondly, That one *Francis Mayell* on the 7th of *January* 1831, and for a long space of time then last past, and from thence and until and at the said time when, &c. held and enjoyed a certain farm and premises, with the appurtenances, situate, &c., as tenant thereof to one *Mary Day* under and by virtue of a certain demise thereof before then made by *Mary Day* to *Francis Mayell*, upon which said demise a certain yearly rent, to wit, the rent or sum of 130*l.* was reserved and made payable from *Francis Mayell* to *Mary Day*: that just before the time when, &c. to wit, on, &c. a large sum of money, to wit, the sum of 110*l.* of the rent aforesaid for one year of the said demise, the residue thereof having been paid and satisfied, was due and owing and payable from *Francis Mayell* to *Mary Day*, and from thence until and at the time when &c. remained and continued due, in arrear, and unpaid: that after the rent

1. A plea under 11 *G.* 2. *c.* 19. *s.* 7., justifying the breaking open a lock to distrain cattle which have been fraudulently removed to elude a distress for rent, must aver that a constable was present when the lock was broken.

2. A plea of recaption upon a rescue must aver that the recaption was on fresh pursuit.

(*a*) 5 *Taunt.* 778.

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so became and was due and payable, and while the same was actually due, in arrear, and unpaid, and within thirty days next before the said time when &c. *Francis Mayell* and the Plaintiff fraudulently and clandestinely conveyed away and carried off and from the said farm and premises so held and enjoyed by *Francis Mayell* as tenant thereof to *Mary Day* as aforesaid, divers, to wit, six cows and six heifers, being the proper goods and chattels of *Francis Mayell*, to prevent the Defendants, as the bailiffs and agents of *Mary Day*, from distraining the same for the said rent so before and at the time of the said removal actually due, in arrear, and unpaid as aforesaid; and for that purpose conveyed the said last-mentioned cows and heifers to the said close in which, &c. without leaving any other goods and chattels on the said farm and premises so held by *Francis Mayell* as aforesaid, whereon the said Defendants, as such bailiffs and agents as aforesaid, could and might distrain for such arrears of rent as aforesaid; for which reason, and because the rent still remained in arrear and unpaid, and because there was no sufficient distress upon the said premises so held by *Francis Mayell* as aforesaid whereon the Defendants, as such bailiffs and agents as aforesaid, could distrain for such arrears of rent, and because the said last-mentioned cows and heifers, which had been so fraudulently and clandestinely conveyed away and carried off by *Francis Mayell* and the Plaintiff as aforesaid after the said rent became and was due and in arrear, still remained and were in the said close in which &c. to which the same had been conveyed as aforesaid, the Defendants, as the bailiffs and agents of *Mary Day*, and by the command of *Mary Day*, afterwards and while the said rent so remained due, in arrear, and unpaid as aforesaid, and within thirty days next after the said last-mentioned cows and heifers were and had been so fraudulently and clandestinely conveyed away and carried

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ried off as aforesaid, that is to say, at the time when &c. broke and entered the said close in which &c., and because the said gate was then and there standing and being on the said close in which &c., and was then and there fastened with the said lock in the declaration mentioned, so that without breaking open and breaking to pieces the said gate, and breaking, injuring, and destroying the lock, the Defendants, as such bailiffs and agents as aforesaid, could not enter into the said close in which, &c. to distrain the said last-mentioned cows and heifers so fraudulently and clandestinely removed as aforesaid, they the Defendants, as such bailiffs and agents aforesaid, at the time when, &c. for that purpose did necessarily and unavoidably a little break open and break to pieces the said gate, and a little break, injure, and destroy the said lock, doing no unnecessary damage, in order to seize and take the said last-mentioned cows and heifers so being in the said close as aforesaid, as a distress for the said arrear of rent so due and owing from *Francis Mayell* to *Mary Day*, and did thereupon, at the said time when &c. and within thirty days after the said last-mentioned cows and heifers had been and were so fraudulently and clandestinely conveyed away and carried off as aforesaid, in the said close in which, &c. take and seize the said last-mentioned cows and heifers so there found and being, as a distress for the said arrears of rent, the same then remaining due, in arrear, and unpaid as aforesaid.

Thirdly, that the said *Francis Mayell*, on the 7th of *January* 1831, and for a long space of time then last past, and from thence until and at the said time when, &c. held and enjoyed a certain other farm and premises, with the appurtenances, situate &c., as tenant thereof to *Mary Day*, under and by virtue of a certain demise thereof before then made by *Mary Day* to *Francis Mayell*, upon which demise a certain yearly rent, to wit, the rent or sum of 130*l.* was reserved and made payable from *Francis*

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Mayell to *Mary Day*: that just before the said time when, &c. to wit, on, &c. a large sum of money, to wit, 110*l.* of the rent aforesaid, was due and owing, and payable from *Francis Mayell* to *Mary Day*, and from thence until and at the said time when, &c. remained and continued due in arrear and unpaid: that just before the said time when, &c. that is to say, after the said last-mentioned rent became and was due and payable, and while the same was actually due, in arrear, and unpaid, the Defendants, as bailiffs and agents of *Mary Day*, and by her command, then and there, to wit, on, &c. at, &c. distrained divers goods and chattels of the said *Francis Mayell*, to wit, six other cows, and six other heifers, then being in and upon the said last-mentioned farm and premises, for the said last-mentioned rent so due and unpaid as aforesaid to *Mary Day*: that the Plaintiff, before the said time when, &c. did wrongfully seize, take, and carry away the said last-mentioned cows and heifers so distrained as aforesaid, and then in the custody of the Defendants as such bailiffs and agents, and the same did carry off from the said last-mentioned farm and premises, and before the said time when, &c. did wrongfully convey the said last-mentioned cows and heifers to the close in which, &c.; and because the said last-mentioned cows and heifers, at the said time when, &c. were wrongfully put and detained by the Plaintiff, and then were in the said close in which, &c. the said rent being unpaid and unsatisfied, the Defendants, as bailiffs and agents of *Mary Day*, and by her command, at the said time when, &c. in order to retake the said cows and heifers, and to impound them as a distress for the said rent so due and unpaid as aforesaid, broke and entered the said close in which, &c.; and because the said gate was then and there standing and being on the said close in which, &c. and was then and there fastened with the said lock in the first count mentioned, so that without breaking open and breaking to pieces the said gate, and break-

breaking, injuring, and destroying the said lock, the Defendants, as such bailiffs and agents as aforesaid, could not enter into the said close in which, &c. to retake the said cows and heifers so wrongfully carried off as last aforesaid, the Defendants, as such bailiffs and agents as aforesaid, at the said time when, &c. and for that purpose, did necessarily and unavoidably a little break open and break to pieces the said gate, and a little break, injure, and destroy the said lock, and take the said cows and heifers so being in the said close as aforesaid, and drive them out of the said close, in which, &c.

The Plaintiff joined issued on the first plea; and to the second replied, that the said *Francis Mayell* and the said Plaintiff did not fraudulently or clandestinely convey away or carry off or from the said farm and premises so held and enjoyed by *Francis Mayell*, as such tenant thereof, to *Mary Day* as aforesaid, the said cows or heifers in the second plea mentioned, or any of them, to prevent the Defendants, as the bailiffs and agents of *Mary Day*, from distraining the same for the said rent so in arrear and unpaid;

And to the third, that he, the Plaintiff, did not, before the said time when, &c. wrongfully, seize, take, or convey away the said cows and heifers in the said last plea mentioned, or any of them, in manner and form as the Defendants had above in their said last-mentioned plea in that behalf alleged.

At the last *Wiltshire* assizes a verdict having been found for the Plaintiff, on the general issue, with a farthing damages; and for the Defendants on the two issues on the pleas of justification,

Wilde Serjt. moved to enter a verdict for the Plaintiff on those two issues, *non obstante veredicto*, on the ground that the first justification was defective in not alleging that the Defendants were attended with a constable

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when they broke open the Plaintiff's gate, and the second, in not alleging that the cattle were retaken upon fresh pursuit.

As to the first, the authority to take cattle or goods fraudulently removed for the purpose of eluding a distress, is given only by the statute 11 *G.* 2. *c.* 19. *s.* 7., by which it is enacted, that "where any goods or chattels, fraudulently and clandestinely conveyed or carried away by any tenant or tenants, lessee or lessees, his, her, or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed, or kept in any house, barn, stable, outhouse, yard, close, or place locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken or seized as a distress for arrears of rent, it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her, or their steward, bailiff, receiver, or other person or persons empowered, to take and seize, as a distress for rent, such goods and chattels, (first calling to his, her, or their assistance the constable, headborough, borsholder, or other peace officer of the hundred, borough, parish, district, or place where the same shall be suspected to be concealed, who are hereby required to aid and assist therein; and in case of a dwelling-house, oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein,) in the day time to break open and enter into such house, barn, stable, outhouse, yard, close, and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she, or they might have done by virtue of this or any former act, if such goods and chattels had been put in any open field or place."

The party, therefore, is without authority, unless he strictly observes the conditions imposed by the statute; and the condition of securing the attendance of a constable has been wisely imposed to prevent a breach of the

the peace. With respect to the second plea of justification, it was essential to the Defendants to allege that the cattle were retaken on fresh pursuit after a rescue. The Defendants are not allowed to retake the cattle at any distance of time, nor unless there has been a rescue.

A rule *nisi* was granted, and

Bompas Serjt. shewed cause. In this case it was not necessary to resort to a constable, nor to allege his presence; at all events the omission is cured by verdict. The clause requiring the presence of a constable when the goods are retaken, is found in a parenthesis, which applies only to the case where the goods are suspected to have been concealed, or have been placed in a dwelling-house. Here, there was no concealment.

As to the second justification, it is alleged that the Plaintiff took the cattle while they were in custody of the Defendants by virtue of the distress: an unlawful rescue, therefore, is in effect averred; *Co. Lit.* 160. *b.*; the Plaintiff was guilty of a misdemeanor; and the Defendants were justified in retaking the distress, wherever it might be found. *Co. Lit.* 161. *Fost.* 320. 1 *Hale*, 459. *Hawk. P. C.* book 2. c. 14. s. 9. In *Genner* v. *Sparks* (*a*), it was held, that if a party about to be arrested attempted to rescue himself, the bailiff might break open a house to seize him; and in *Francombe* v. *Pinche* (*b*), it was held allowable to break open a house in order to recover goods which had been improperly rescued. By the stronger reason, it was allowable for the Defendants under similar circumstances to enter the Plaintiff's field.

TINDAL C. J. The Court is of opinion that neither the second nor third pleas state facts sufficient to justify

(*a*) 6 *Mod.* 173. (*b*) *Esp. N. P.* 396. 4th edit.

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the trespass alleged in the declaration. The Plaintiff complains of a trespass committed by breaking his close, and particularly by breaking the locks of the gate. The first justification is, that rent being due from *Mayell* as tenant to *Mary Day*, the Plaintiff, and *Mayell* within thirty days before the time when, &c. fraudulently carried off cattle from *Mayell's* premises to prevent a distress, and conveyed them to the close in which, &c., and that the rent remaining unpaid, the Defendants, as bailiffs of *Mary Day*, and by her command, within thirty days broke and entered the close in which, &c. and broke the lock in order to seize, and did seize the said cattle as a distress for the rent so in arrear.

The objection to that plea is, that all the conditions imposed by the statute have not been observed by the Defendants. It is contended, that before the lock was broken a constable ought to have been called in aid of the Defendants, and that the plea is bad for want of averring his presence.

It must be observed, that the authority to take the cattle is an authority given by act of parliament to the landlord, and being a new authority, care must be taken that the course pointed out by the statute be strictly pursued.

It has been urged on the part of the Defendants, that the presence of a constable is not required where there has been no concealment and the entry is made into a close: but upon looking at the statute, we are of opinion that the presence of a constable is required upon breaking open any place locked up, and in case of breaking into a house, the additional precaution of a previous application to a magistrate.

This appears from the first section of the statute, which enacts, that in case any tenant shall "fraudulently and clandestinely convey away, or carry off or from

from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable, it shall and may be lawful to and for every landlord or lessor, landlords or lessors, or any person or persons by him, her, or them for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels aforesaid, to take and seize such goods and chattels wherever the same shall be found, as a distress for arrears of rent, and the same to sell or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords, in and upon such premises, for such arrears of rent, any law, custom, or usage to the contrary in anywise notwithstanding."

The first section, therefore, gives him the same authority over the premises to which goods shall have been clandestinely removed, as over the premises of the tenant, and on those premises he could have no right to break open a lock. The seventh section then gives him a more extended remedy, and enacts, — contemplating the infirmity of the common law, which would not allow a breaking in where premises were fastened, — that "where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant or tenants, lessee or lessees, his, her, or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed, or kept in any house, barn, stable, outhouse, yard, close or place locked up or fastened, or otherwise secured so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent, it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her, or their steward, bailiff, receiver, or other per-

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son or persons empowered, to take and seize as a distress for rent, such goods and chattels, (first calling to his, her, or their assistance, the constable, headborough, borsholder, or other peace officer of the hundred, borough, parish, district, or place, where the same shall be suspected to be concealed, who are hereby required to aid and assist therein; and in case of a dwelling house, oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein,) in the day time to break open and enter into such house, barn, stable, outhouse, yard, close, and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she, or they might have done by virtue of this or any former act, if such goods and chattels had been put in any open field or place."

It is impossible to read this section without seeing, that in order to prevent a breach of the peace, the presence of a constable is required in every case where force is resorted to, and if the goods withdrawn be secured in a dwelling-house, that a previous application must be made to a magistrate. The landlord has the remedy of pursuing the goods, if he fulfils the conditions imposed by the statute; but unless he does so, his proceeding is without authority.

That disposes of the first justification.

The second states that the Defendants had distrained cattle of *Mayell's* for rent due from him to *Mary Day*, and that the Plaintiff, before the time when they entered into his close, wrongfully took and carried away the cattle so distrained and then in the custody of the Defendants, and wrongfully conveyed them from *Mayell's* farm to the close in which, &c.; and because they were wrongfully detained by the Plaintiff in the close in which, &c. and the rent due to *Mary Day* was unpaid, the Defendants, as bailiffs of *Mary Day*, broke open the close

close in which, &c. to retake the cattle and impound them as a distress for the rent due.

That plea, in effect, states a retaking of cattle rescued after a distress, and therefore should have shewn some authority to go to the premises of the rescuer, and take the cattle from thence. The first material omission in that respect is, that this is not stated to have been done upon fresh pursuit. For aught that appears to the contrary, the retaking might have been at any distance of time. Now, what is the law on this subject? The common law gave the party injured a writ of *rescous*, but that being found insufficient, he was enabled by stat. 2 *W. & M. c.* 5. to sue for treble damages. Besides that, he had another remedy by which he might replace himself; namely, a recaption: but that is confined to cases where the recaption can take place without a breach of the peace, and upon fresh pursuit. Instances are pointed out in 2 *Roll. Abr.* 565, 566.; and *Blackstone* says (*a*), "That this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law." If the common law will not allow a party to resort to force for the purpose of retaking his own goods, there is no reason why a larger power should be extended to the case of goods distrained, at any rate, unless they are retaken upon fresh pursuit. In *Genner* v. *Sparks*, a bailiff had attempted to arrest a party against whom he had a legal warrant, which is very different from the

(*a*) 3 *Bl. Com.* 5.

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case of an unauthorized individual taking the law into his own hands. In *Francombe* v. *Pinche* there was a continuation of possession from the time of the seizure. We regret, that the Plaintiff should obtain his costs upon this objection, where the merits of the justification have been found for the Defendant; but we cannot esteem the pleas sufficient, and the rule must therefore be made absolute.

PARK J. concurred.

GASELEE J. The first section of the statute gives no authority to break a lock; and the seventh, which gives the authority, requires the presence of a constable.

BOSANQUET J. I am of the same opinion as to both the pleas. If a party justifies a breaking open to take goods which have been fraudulently removed to elude a distress, as he has no authority except under the seventh section of 11 G. 2. *c.* 19., he must pursue the course prescribed by that statute. In every such case he must be attended by a peace officer, and in case of breaking open a house must first apply to a magistrate. As to the second justification, there is no authority for saying that goods taken out of the custody of a party who has distrained them may be retaken at *any* time afterwards. In *Francombe* v. *Pinche* there was a continuance of possession.

Rule absolute.

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June 8.

TRESPASS for breaking and entering Plaintiff's dwelling-house, and taking goods.

The Defendants pleaded that one *Henry Lloyd* became a bankrupt on the 27th of *February* 1830; that a commission was issued on the petition of one *John Green*, and *John Green* the younger, and *Lloyd* adjudged a bankrupt; that the Defendants *Cherrell* and *Green* were chosen assignees; that the commission was still in force, and *Henry Lloyd* became lawfully possessed of the goods, &c. which were by his bankruptcy vested in the Defendants, as his assignees, and were in the said house in which, &c.; that the Defendants were entitled as assignees to take away and have possession of the said goods, &c. and thereupon entered and peaceably took, &c.

The Plaintiff, in his replication to this plea, admitted the commission as stated in the plea, but set forth a prior commission, under which one *Richard Cuttill* had been chosen assignee; and averred that no certificate had been obtained by the said *Henry Lloyd* under the first commission.

The Defendants rejoined, that *Henry Lloyd* had in his possession, order, and disposition, the said goods by the permission of *Cuttill*, and that the said goods, &c. passed by the assignment under the second commission.

Demurrer and joinder.

A second commission of bankrupt is void while a former one remains in force: to a replication in trespass, therefore, asserting title to goods under a first commission still in force, it is ill for a defendant who claims under a second commission, to rejoin, that the goods were in the order and disposition of the plaintiff by the permission of the assignee under the first commission, and that they passed to the defendant by the assignment under the second.

When the case was called on, the Court, stopping *Russell* Serjt., who was to have argued in support of the demurrer, asked

E. Lawes

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E. Lawes Serjt., who appeared for the Defendants, whether he could distinguish this case from *Fowler* v. *Coster* (*a*), and *Till* v. *Wilson*. (*b*)

Lawes admitted that he could not; except that those were cases in which application was made by a bankrupt for his discharge: here the Plaintiff was a stranger to both commissions.

Sed per Curiam. The Court could not hold the second commission void in one case, and support it in another: the decision in the King's Bench is quite decisive; and as we approve of that decision, we must adhere to it.

Judgment for the Plaintiff.

(*a*) 10 *B.* & *C.* 427. (*b*) 7 *B.* & *C.* 684.

June 9.

WILCE *v.* WILCE.

Testator commenced his will as follows: "As touching such worldly property wherewith it hath pleased God to bless me, I give, devise, and dispose of the same in manner following;" and, after various bequests and devises, concluded: "All the rest of my worldly goods, bonds, notes, book debts, and ready money, and every thing else I die possessed of, I give to my son *George*:"

Held, that *George* took a fee in lands of the testator not specifically devised by the will.

THIS was a writ of entry brought by the demandant to recover from the tenant certain land, called *Carclase*, in the parish of *St. Kew*, in the county of *Cornwall*, of which one *George Wilce* died seised in fee within thirty years next before the issuing the original writ. On his death the right descended to one *John Soper Wilce*, the eldest son and heir of *George Wilce*, and from him, on his death, to the said demandant, the son and heir of

John

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John Soper Wilce; and into which land the tenant entered by abatement after the death of *George Wilce*, and in the lifetime of *John Soper Wilce*.

To this the tenant pleaded, first, a devise to him of the land in fee simple by the said *George Wilce*; secondly, a devise to him of the land for the life of the said tenant by the said *George Wilce*; which devises the demandant in the replication denied.

At the trial before *Taunton* J., last *Cornwall* Spring assizes, a verdict was taken for the demandant, subject to the opinion of the Court on the following case:—

George Wilce being seised in fee and in possession of certain real property, made his will, dated *June* 1804, duly attested to pass real property, by which, after indicating his intention to dispose of all his property by the following preamble, — "As touching such worldly property wherewith it hath pleased God to bless me in this world, I give, devise, and dispose of the same in the following manner and form,"—he devised 20*l.* a year to his widow, payable out of his estate called *Carclase*; 20*l.* a year to his daughter *Ann Triffey*, also charged on *Carclase*, together with a legacy of 50*l.* and sundry chattels; his estate in *Crewkhern*, and all thereunto belonging, to his son *John*, together with two houses and gardens in *Chappell Amble*, sundry chattels, and 10*l.*; one halfindale of his estate called *Trevaran* to his daughter *Catharine Lean*, together with sundry chattels, and 10*l.*; one halfindale of his estate called *Trevaran* to his son *Thomas*, together with sundry houses and gardens in *Chappell Amble*, and sundry chattels; one halfindale of his estate called *Tregare* to his son *Henry*, together with a field and house in *Chappell Amble*, and sundry chattels, in consideration of the devisee's paying the devisor's grandchildren 5*l.* each; one halfindale of *Tregare* to his daughter *Mary Ann*, together

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together with sundry chattels, upon condition of her paying 10*l.* to each of his brothers *Thomas* and *John*, and his sister *Elizabeth People*, and to his brother *William* 6*l.* yearly out of *Tregare*; his estate in *Kew*, called *North Barton*, to his son *George*, upon paying 10*l.* a year each to testator's daughters *Ann Triffey* and *Catharine Lean*, and 10*l.* a year each to testator's sons *Thomas* and *Henry*. After a legacy of 5*l.* each to *Robert* and *Elizabeth Rawden*, the will proceeded as follows: — "If any or either of my before-mentioned children should happen to die before they shall arrive at the age of twenty-one years, all houses, gardens, premises, or parts of premises, given in this my will, to either of them so dying, shall become the property of my children that shall be then living, share and share alike. All the rest of my worldly goods, bonds, notes, book debts, and ready money, and every thing else I die possessed of, I give to my son *George*, whom I make my whole and sole executor. And I do hereby nominate and appoint *John Tickell*, Esq. of the parish of *St. Minver*, and *Nicholas Thomas* of the parish of *St. Kew*, in trust to pay all the legacies before mentioned, and for fulfilling all this my last will and testament."

The testator died in *July* 1804, without having altered or revoked his said will. At the time of making his will, and of his death, he was, amongst other real property, seised in fee and in possession of the estate of *Carclase*, in the will mentioned, which was the subject of this action, and was not included in any of the lands or tenements specifically devised in and by the said will.

The demandant was the son and heir at law of the said *John Soper Wilce*, who was the eldest son and heir at law of the testator, and who is mentioned in the will as his son *John*.

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The tenant was a younger son of the devisor, and the person named in the will as executor and legatee.

The question for the opinion of the Court was, Whether the above-mentioned estate of *Carclase* passed to the tenant, either in fee simple or for life, under the above will? Should the Court be of opinion that it did so pass, then the verdict was to be entered for the tenant; but, if of a contrary opinion, then the verdict was to be entered for the demandant.

Russell Serjt. for the demandant. The interest in *Carclase* did not pass by this will. It will be argued on the other side, that the will commences with a preamble shewing the testator's intention to pass all his property. But in *Doe d. Spearing* v. *Buckner* (*a*), Lord *Kenyon* says, "The testator set out in the beginning of his will as if he had intended to dispose of all his property: but though those general words would have shewn his intention if there had been subsequent words in the will to carry that intent into execution, as was held by Lord *Talbot* in *Ibbetson* v. *Beckwith* (*b*), it has been held, in a variety of cases, that alone they are not sufficient to dispose of a fee."

There must, therefore, be other words pointing out the property in dispute as intended to pass by the will: and the proof that it was meant to pass lies on the devisee; for in *Roe d. Helling* v. *Yeud* (*c*), *Mansfield* C. J. said, "In cases between the heir and the devisee, the question is not whether the heir can prove that the testator did not intend to pass real property, but whether the devisee can prove that he did. The proof lies on the devisee." The intention must be clearly made out. And the language of the residuary clause in this will,

(*a*) 6 *T. R.* 610. (*b*) *Cas. Temp. Talb.* 157. (*c*) 2 *N. R.* 214.

referring

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referring only to chattels, is not sufficient to pass real estate, unless the intention be perfectly clear. In *Doe d. Hick* v. *Dring* (*a*), where the question was what should pass under the word *effects*, *Le Blanc* J. said, "The question is, what is the meaning of the word *effects*; if the Court can see that the testator meant by it to pass his real estate, then the judgment must be for the plaintiff; but if we are not perfectly satisfied upon that point, then the judgment must pass for the heir." In *Doe* v. *Rout* (*b*) all the cases are considered by *Gibbs* C. J., and he refers to *Timewell* v. *Perkins* (*c*), where the expression "all the rest of my property" was held to be confined to personal property, because the bequest preceding it was of personal property also. In *Doe d. Hurrell* v. *Hurrell* (*d*), *Abbott* C.J. considers the omission of words of limitation a circumstance to be in some degree relied on. Now, in this will, where the testator speaks of the realty generally, he employs the word estate; where particularly, he employs apt words, as house, garden, or the like; but in the residuary clause he mentions only the rest of his worldly *goods*, and things which must be classed as chattels. [*Bosanquet* J. referred to *Stuart* v. *Marquis of Bute*. (*e*)]

Merewether Serjt. *contrà*. The testator's estate of *Carclase* passed under these residuary words. The residuary words taken alone might not have been sufficient; but taken in conjunction with the preamble to the will, the testator's intention must be considered as sufficiently expressed. In *Doe d. Spearing* v. *Buckner*, *Roe d. Helling* v. *Yeud*, and *Doe d. Hicke* v. *Dring*, there

(*a*) 2 *M.* & *S.* 448.
(*b*) 7 *Taunt.* 79. 2 *Marsh.* 397.
(*c*) 2 *Atk.* 102.
(*d*) 5 *B.* & *A.* 18.
(*e*) 1 *Dow.* 73.

was

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was no such preamble to assist the construction of the residuary clause. The cases referred to by *Gibbs* C. J., in *Doe d. Bunny* v. *Rout*, are all in like manner distinguishable from the present; and the observation he makes on the will in *Timewell* v. *Perkins* is in favour of the Defendant here, for the residuary clause in this will is preceded not by bequests of personal property, but but by devises of the realty. "All the rest of my worldly goods," coming after several devises of realty, must, according to the construction adopted in *Timewell* v. *Perkins*, mean, even if taken in connection with what precedes, *all the rest of my property*. But it may be taken separately, for by itself it is a perfect and sensible clause; and in *Hopewell* v. *Ackland* (*a*), *Trevor* J. said of a new and distinct sentence, "*Item* is a usual word in a will to introduce new distinct matter; therefore, a clause thus introduced, is not influenced by, nor to influence, a precedent or subsequent sentence, unless it be of itself imperfect and insensible without reference; therefore not here, where both clauses are perfect and sensible." Then, in *Noel* v. *Hoy* (*b*), the nomination by a will of the testator's wife as executrix, "thereby bequeathing to her all the property of whatever description or sort that I may die possessed of," &c. was held to pass a copyhold estate belonging to the testator, which he had surrendered to the use of his will. In *Smith* v. *Coffin* (*c*), where *A.*, by his will, "as to such worldly estate as God had pleased to bless him with," made a provision for his heir at law, and "devised all the rest and residue of his goods, chattels, rights, credits, personal and testamentary estate whatsoever, to *B.* for his own use, benefit, and disposal," it was held, that under that clause *B.* took an estate in fee in the

(*a*) 1 *Salk.* 239. (*b*) 5 *Madd.* 38. (*c*) 2 *H. B.* 444.

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lands of the testator. And in *Doe d. Penwarden* v. *Gilbert* (*a*), where the language of the will was, "As for my temporal estate and effects, I give and dispose of the same in manner following: I give and bequeath to *L. C.* 4*l.*; I give and bequeath to *M. H.* 3*l.*; I give, *devise*, and bequeath to *J. G.* all my lands, tenements, and hereditaments, with their appurtenances, particularly those called *B.* and *C.*; and all the rest and residue of my goods and chattels, personal and *testamentary effects* whatsoever, I give *and bequeath* to the said *J. G.*, whom I make my sole executor of this my will;" it was held, that a fee in the estates *B.* and *C.* passed to *J. G.* under the words all the rest and residue of my *testamentary effects*. That the introductory words of a will are important towards ascertaining the testator's intention, is established by *Beachcroft* v. *Beachcroft* (*b*), *Ibbetson* v. *Beckwith* (*c*), and *Hogan* v. *Jackson*. (*d*) From the introductory words of this will, "touching such worldly property wherewith it has pleased God to bless me," the Court will infer that the testator intended to dispose of all his property; and where there is an intention not to die intestate, the words of the residuary clause may be applied as well to real estate as to personalty. If the Defendant takes the estate in question under the residuary clause, he takes a fee, because the property is charged with the payment of annuities.

Russell. The residuary clause having attached the word rest expressly to *goods*, "all the rest of my worldly *goods*," it cannot be applied to realty. In *Hopewell* v. *Ackland*, the testator in the preceding part of his will had disposed of land, and of nothing else: in

(*a*) 3 *B.* & *B.* 85.
(*b*) 2 *Vern.* 690.
(*c*) *Cas. temp. Talb.* 157.
(*d*) *Cowp.* 299.

Noel

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Noel v. *Hoy* the devise was for the maintenance of children, for which it might be necessary to call the land in aid: in *Smith* v. *Coffin*, the residuary devise was of the testator's testamentary *estate*, not his worldly *goods*, and there was a preamble to the will in the same language: in *Doe* v. *Gilbert*, also, the preamble referred to the testator's temporal *estate*: and in *Doe d. Andrew* v. *Lainchbury* (*a*), the testator had devised real property after a preamble as to personalty, so that the words property and effects were used as synonymous to real estate, — a circumstance on which Lord *Ellenborough* mainly relied. In residuary clauses which have been held to convey the realty, are found either the word *estate*, or an express reference to the realty, or a general bequest of the residue without any qualification, as here, by a word denoting personal property.

TINDAL C. J. The only question here is, whether on the face of this will there is a sufficient indication of an intention on the part of the testator to pass real property by the residuary clause of the will, because the intention of the testator, as it has been well said, is the polar star in the construction of a will. By the preamble it is quite clear he meant to dispose of all his property. "As touching such worldly property wherewith it hath pleased God to bless me in this world, I give, devise, and dispose of the same in the following manner and form." Nothing can be more comprehensive than these words: no one can doubt that he meditated disposing of all he had in the world. The question is, whether, looking at the body of the will, we can see he has carried that intention into effect. First, he proceeds to dispose of all his lands, which shews that under worldly property he comprehended land. Then he

(*a*) 11 *East*, 290.

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comes to the residuary clause,—"All the rest of my worldly goods, bonds, notes, book debts, and ready money, *and every thing else I die possessed of*, I give to my son *George*."

I can readily agree, that if this clause had been confined to "all the rest of my bonds, notes, book debts, and ready money," it would not have been sufficient to pass the testator's real property. The expression *worldly goods* must have been confined to those which are specified in succession; but the clause then comes to its natural conclusion, and the testator adds, "and every thing else I die possessed of." By *every thing else* must be understood every thing else not before disposed of. Seeing what was the testator's intention as disclosed by the preamble to the will, we cannot but say he has employed words sufficient to carry it into effect. *Smith* v. *Coffin* comes nearest to the present case.

PARK J. I am of the same opinion. Morally speaking, there can be no doubt of this testator's intention to dispose of every thing which belonged to him: but has he sufficiently disclosed it by the language of the will? That can only be collected from the circumstances of the particular case, for no decision on other wills can exactly apply; and at first I entertained some doubt, because, the heir being favoured at law, the *onus probandi* rests with the devisee. But the testator begins with expressing his intention to dispose of all his worldly property; and having in no less than eleven distinct paragraphs distributed minutely various portions of it, he leaves every thing else he dies possessed of to his son *George*, the other property left to him having been burthened by four annuities. *Doe* v. *Gilbert* is a strong case, but not stronger than the present. There the will commenced with the words, "As for my temporal estate and effects, I give and dispose of the same in manner

manner following;" and after various bequests and devises, the testator concluded: "All the rest and residue of my goods and chattels, personal and testamentary effects whatsoever, I give and bequeath to *J. G.*" And it was contended, that *testamentary effects* must be confined to personalty: but the Chief Justice said, "There are many cases in which the words *estate* and *effects* will give a fee from the company in which they are found. So that, considering the case of *Smith* v. *Coffin*, and that the word *testamentary* is here accompanied by nearly the same expressions as it was in that case, it appears clear that the testatrix in the present case has, by the introductory words, expressed an intention to dispose of all her property, and in the residuary clause used expressions sufficient to carry that intention into effect." Coupling, therefore, the introductory with the residuary clause in this will, and considering that, after enumerating various kinds of chattels, the testator adds, "And every thing else I die possessed of," there is no reason for contending that words so general should be confined to things *ejusdem generis* as those immediately before specified.

GASELEE J. This is a nice question, on which I have had some doubts, and at first thought the heir entitled; but upon looking more accurately into the will, and considering the cases of *Smith* v. *Coffin* and *Doe* v. *Gilbert*, I think that real estate will pass under the language of this residuary clause. For in *Smith* v. *Coffin* and *Doe* v. *Gilbert*, as well as in the present case, the bequest of all the rest of the testator's testamentary effects was accompanied with a previous bequest of personal property. In *Doe* v. *Gilbert*, as in the present case, there was a devise of specific estates both to the heir at law and the residuary devisee; and it was held, that under the general language of the residuary clause,

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coupled with the intention of the testator, as disclosed by the preamble, the devisee took an estate in fee, although the words of the specific devise would only have carried an estate for life.

BOSANQUET J. I am of opinion that the testator's interest in his estate of *Carclase* passed to the Defendant by the language of the residuary clause. The introductory words of the will show the testator's intention to dispose of the whole of his property. Those words alone would not be sufficient to pass real property. There must be words in the will to carry such an intention into effect. The words relied on here are, "Every thing else I die possessed of;" and the question is, whether the operation of those words is restrained by the language with which they are associated; for if those words had stood alone, they would clearly carry real estate. *Hurtep* v. *Brooman*. (*a*) But the decisions of *Smith* v. *Coffin* and *Doe* v. *Gilbert* are extremely strong to shew these words are not so restrained. In both of those cases the language used was similar: the introduction to the will shewed the testator's intention to dispose of the whole of his property, and the words of the residuary clause were, of themselves, ambiguous. In both cases the words *testamentary estate* or *effects* were preceded by an enumeration of chattel property; in both, *testamentary estate* and *effects* was held to extend to any thing devisable; and, in both, recourse was had to the introductory words to explain the testator's meaning. *Doe* v. *Lainchbury* is also a strong case. Lord *Ellenborough* indeed said, that there the "testator directed money to be laid out in the purchase of land, to be added to his '*other adjoining property.*' That gives us a standard of his meaning of the word *property*, and

(*a*) 1 *Br. C. C.* 437.

shews

shews that he meant by it real estate;" but he only mentioned that as a corroborating circumstance. There is strong ground, therefore, for deciding in this case that the expression "Every thing else I die possessed of," is not to be restrained by the preceding words. But we are not driven to that, because there is clearly a break in the sentence before they occur, so that there is no reason for associating them with what precedes; and in that respect the case differs from *Stuart* v. *Marquis of Bute*, where the devise was of certain freehold manors, lands, collieries, &c.; and where the testator bequeathed all and every the waggon-ways, rails, staiths, and all implements, utensils, *and things*, which should be used or employed for working and management of the collieries, and might be deemed of the nature of personal estate, to be enjoyed by the persons respectively entitled under the will to the said manors, lands, collieries, &c.; and the question was, what *things* passed with the collieries.

Upon the whole, I think that, under the language of this residuary clause, the Defendant was entitled to take real estate, and if entitled at all he was entitled in fee.

Judgment for the Defendant.

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B. sued out execution against *A.* After seizure, and before sale, the execution was set aside by rule of K. B., of which the sheriff received notice from *A.* before the sale, and by the terms of the rule *A.* was to bring no action for the seizure. The sheriff having proceeded to a sale, on the ground that he had received no notice of the rule from *B.*, Held, that *A.* might sue *B.* in trespass for the sale.

THIS was an action of trespass, to which the Defendant, in his third plea (which raised the point immediately before the Court), pleaded in bar a judgment recovered by him against the present Plaintiff; the issuing of two writs thereon, under which a partial levy had been made; that a *testatum fi. fa.* was issued, returnable on *Tuesday* the 28th *January*, indorsed to levy 25*l.* 9*s.*, with poundage, &c., being the residue of the damages recovered on the judgment; and that this writ was delivered to the sheriff on the 15th *January* 1831, who entered and seized the goods of the present Plaintiff. The plea then alleged, that such proceedings were had in the Court of King's Bench that on the 22d *January* 1831 it was ordered, by a rule of that Court, that the last-mentioned execution should be set aside without costs, the Defendant in that cause (that is, the present Plaintiff,) undertaking not to bring any action on account of the said seizure.

The replication to that plea alleged, that the seizure in the said rule mentioned, and the seizure in the introductory part of the third plea mentioned, were other and different; upon which issue was joined; and the Plaintiff having also new assigned to the second plea, that he brought his action for another and different trespass than that justified in the second plea, the Defendant pleaded not guilty to such new assignment.

At the trial two writs were proved: one sued out on the 24th *December* 1830, to levy 46*l.* 10*s.*, returnable the 11th *January*, reciting a previous *fieri facias*; and another sued out on the 10th *January* 1831, to levy 25*l.*

25*l.* 9*s.*, returnable the 28th *January*. The sheriff took and kept possession under these writs.

It appeared that the rule *nisi* for setting aside the execution, which was granted by the Court of King's Bench on *Saturday* the 15th *January*, was served on the present Defendant (the Plaintiff in the former cause), on the evening of the same day, in *London*, after the time for putting letters in the post; that on the morning of the 18th, which was *Tuesday*, the under-sheriff of *Northampton* was served with the rule by the attorney for the present Plaintiff; that the present Plaintiff and his attorney then remonstrated with the under-sheriff against his going on with the sale, notwithstanding which he proceeded to sell on the 18th, alleging that, as he had not received any instructions from the attorney of the Plaintiff in the cause (the present Defendant), he was not warranted in staying proceedings.

A verdict was found for the Plaintiff, subject to the opinion of the Court on these facts.

Adams Serjt. obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the ground that the Plaintiff was precluded from suing by the express terms of the rule of the Court of B. R., which set aside the execution; but that, if any action lay, it ought to have been brought against the sheriff, who was solely responsible, andnot against the present Defendant.

Goulburn Serjt. shewed cause. The rule was delivered to the Defendant on the 15th of *January*, and the condition, that the Plaintiff should bring no action, could only apply to the seizures made previously to that day. The rule does not restrain him from suing for the subsequent seizure and sale; if it did, the Plaintiff would have gained nothing by setting aside the execution. And the action well lies against the Defendant;

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ant; for though the sheriff may be criminally responsible for disobeying the rule of Court, the Defendant, who sets him in motion, is civilly responsible for all the damage done. *Bates* v. *Pilling* (*a*), *Parson* v. *Lloyd* (*b*), *Barker* v. *Braham.* (*c*)

Adams. There was but one seizure; there was no discontinuance of possession; and the sale on the 18th was only a consequence of the act of seizure. The rule of Court was meant to apply to all proceedings under the seizure; the Plaintiff, therefore, was bound by the undertaking not to sue on account of the seizure, and the present action is a violation of good faith. There is no real distinction between seizure by the sheriff, and sale; the whole may be considered as one transaction. But, at all events, the sheriff alone is responsible after the notice served on him on the morning of the sale. It is immaterial by whom he was apprised of the rule of Court; and if his proceeding be a violation of the rule, he is the party to answer for it.

Cur. adv. vult.

TINDAL C. J. This is an action of trespass, to which the Defendant, in his third plea (which raises the point immediately before the Court), pleads in bar a judgment recovered by him against the present Plaintiff; the issuing of two writs thereon, under which a partial levy had been made; that a *testatum fi. fa.* issued, returnable on *Tuesday* the 18th *January*, indorsed to levy 25*l.* 9*s.*, with poundage, &c., being the residue of the damages recovered on the judgment; and that this writ was delivered to the sheriff on the 15th *January* 1830, who entered and seized the goods of the present Plaintiff. The plea then alleges, that such proceedings were had

(*a*) 6 *B.* & *C.* 38. (*b*) 3 *Wils.* 341. (*c*) 3 *Wils.* 368.

in

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in the Court of King's Bench that, on the 22d *January* 1831, it was ordered, by a rule of that Court, that the last-mentioned execution should be set aside without costs, the Defendant in that cause (that is, the present Plaintiff,) undertaking not to bring any action on account of the said seizure.

The replication to this plea alleges, that the seizure in the said rule mentioned, and the seizure in the introductory part of the third plea mentioned, are other and different; upon which issue is joined; and the Plaintiff having also new assigned to the second plea, that he brought his action for another and different trespass than that justified in the second plea, the Defendant pleads not guilty to such new assignment.

The real question, therefore, raised between the parties on these pleadings is, whether there has been any seizure by the sheriff subsequent to that which was covered by the rule; and if so, whether the Defendant (the Plaintiff in the former action) is responsible for that seizure.

At the trial two writs were proved: one sued out on the 24th *December* 1830, to levy 46*l.* 10*s.*, returnable the 11th *January*, reciting a previous *fieri facias*; and another sued out on the 10th *January* 1831, to levy 25*l.* 9*s.*, returnable the 28th *January*. The sheriff took and kept possession under these writs.

It appeared that the rule *nisi* for setting aside the execution, which was granted by the Court of King's Bench on *Saturday* the 15th *January*, was served on the present Defendant (the Plaintiff in the former cause) on the evening of the same day, in *London*, after the time for putting letters in the post; that on the morning of the 18th, which was *Tuesday*, the under-sheriff at *Northampton* was served with the rule by the attorney for the present Plaintiff; that the present Plaintiff and his attorney then remonstrated with the under-sheriff against

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against his going on with the sale; notwithstanding which he proceeded to sell on the 18th, alleging that, as he had not received any instructions from the attorney of the Plaintiff in the cause (the present Defendant), he was not warranted in staying proceedings.

A verdict was found for the Plaintiff, subject to the opinion of the Court on these facts. It has been insisted that, under the circumstances above stated, the Plaintiff ought to have been nonsuited: first, because the present Defendant was not responsible for the conduct of the sheriff in proceeding to sell after the rule for staying proceedings had been served upon the sheriff; and, secondly, because the rule of the Court of King's Bench, by which the execution was set aside, had restrained the present Plaintiff from bringing any action for the seizure.

But we are of opinion that the Plaintiff is entitled to retain his verdict. It is admitted by the pleadings, that the execution has been set aside. The present Defendant, therefore, cannot justify his acts, as Plaintiff in the former cause, under proceedings which must now be taken to be null and void. In suing out his execution originally, he must be considered as a wrongdoer; and, having set the sheriff in motion by a writ illegally issued, he must answer for the acts of the sheriff in executing such writ, unless something can be shewn to distinguish his case from that of any other plaintiff who delivers a writ to the sheriff to be executed without lawful authority.

It is contended that, as the sheriff had been served with the rule for staying proceedings by the present Plaintiff, it was not incumbent on the present Defendant to take any further step to prevent the sale; but it is to be recollected, that the seizure must now be taken to have been originally wrongful; and the ineffectual act of the present Plaintiff, in endeavouring to prevent the sheriff

sheriff from proceeding, by communicating to him the rule of Court for staying proceedings, cannot absolve the Defendant from that liability to which he would have been subject if the present Plaintiff had not interfered. But it is insisted, that the Plaintiff is restrained by the undertaking contained in the rule of the Court of King's Bench from bringing an action for the seizure. It is unnecessary to enquire what the effect of that undertaking might be as a legal defence in this Court, if it had applied to the subject of the present action: for it appears to us, that the sale which took place on the 18th *January* by the sheriff, is a separate and distinct trespass from the original taking, and that the undertaking mentioned in the rule of the 22d *January* does not embrace such subsequent sale.

The rule *nisi* for setting aside the execution was granted on the 15th; and the language of the rule made on the 22d, by which the rule *nisi* was made absolute, must be taken to refer to matters which occurred previously to the 15th, and to which the rule of the 15th applied. It cannot, therefore, be supposed to embrace the sale of the 18th, which took place, as is alleged in the new assignment, after the making of the rule relied upon in the second plea; and is a different seizure from that mentioned in the rule of the 22d *January*, as alleged in the replication to the third plea.

For these reasons, we think that the rule ought to be discharged.

Rule discharged.

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LIGGINS *v.* INGE and Another.

Plaintiff's father, by oral licence, permitted Defendants to lower the bank of a river, and make a weir above Plaintiff's mill, whereby less water than before flowed to Plaintiff's mill: Held, that Plaintiff could not sue Defendants for continuing the weir.

THIS was an action on the case, and the declaration stated that the Plaintiff, before and at the time of the committing the grievances by the Defendants as thereinafter next mentioned, was, and from thence hitherto had been, and still was lawfully possessed of and in a certain corn-mill, with the appurtenances, situate and being in the county of the city of *Coventry;* and by reason thereof, before and at the time of the committing of the grievances by the said Defendants as thereinafter mentioned, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or watercourse, which during all that time ought to have run and flowed in its usual and proper course, flow, and current, and until the obstructions and diversions thereof thereinafter next mentioned of right had run and flowed, and still of right ought to run and flow, in its usual and proper course, flow, and current unto the said corn-mill of the Plaintiff, for supplying the same with water for the working and more beneficial use and enjoyment thereof, to wit, at, &c.; yet the Defendants, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and prejudice the Plaintiff in that respect, and to deprive him of the use, benefit, and advantage of the water of the said stream or watercourse, and to hinder and prevent him the Plaintiff from working his mill in so ample and beneficial a manner as he had theretofore done, and of right ought to have done, and to injure him in

in the way of his trade and business of a miller, which he during all the time aforesaid exercised and carried on, and still did exercise and carry on therein, and to put him to great charge, expense, trouble, and inconvenience, whilst he the Plaintiff was so possessed of the said mill, with the appurtenances as aforesaid, and so exercised and carried on his said trade or business therein, to wit, on, &c., and on divers other days and times between that day and the commencement of that suit, to wit, at, &c., wrongfully and injuriously cut down, pulled down, lowered, and made, and caused and procured to be cut down, pulled down, lowered, and made, a great part, to wit, fifty feet of one of the banks of the said stream or watercourse, divers, to wit, ten feet lower than the same had theretofore been, or of right ought to have been, or still of right ought to be, and then and there wrongfully and injuriously erected, put down, set down, placed, and deposited, and caused and procured to be erected, put down, set down, placed, and deposited, in and upon the said bank of the said stream or watercourse, at the said part thereof so lowered as aforesaid, and above the said corn-mill of the Plaintiff, divers, to wit, ten sluices, ten dams, ten weirs, ten fletchers, and ten boards, and wrongfully and injuriously kept and continued, and caused to be kept and continued, the said sluices, dams, weirs, fletchers, and boards so there respectively erected, set up, put down, set, placed, and deposited as aforesaid, for a long space of time, to wit, from thence hitherto, and thereby and therewith, and by means thereof, during all the time aforesaid wilfully and wrongfully diverted and turned, and let off, and caused to run and flow divers large quantities of the waters of the said stream or watercourse out of its proper course and channel, and away from the said corn-mill of the Plaintiff, and stopped, and prevented, and hindered divers other

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other large quantities of the water of the said stream or watercourse from running or flowing along in its usual and proper course, flow, and current, to the said corn-mill, and from supplying the same with the usual, proper, and regular flow of water for the necessary and convenient working thereof, as the same of right ought to have done, and otherwise would have done, and by reason thereof caused and procured divers other large quantities of the water of the said stream or watercourse to run and flow to the said mill in unequal quantities and more irregularly than the same had theretofore done, or of right ought to have done, or still of right ought to do: by means of which said several premises, and for want of a sufficient, regular, and proper supply of water, the Plaintiff on the several days and times aforesaid could not work or use his said corn-mill, or follow, use, or exercise his said trade or business of a miller therein, in so large, ample, and beneficial a manner as he might and otherwise would have done, but was thereby during all the time aforesaid deprived of the use and enjoyment of his said corn-mill, and of all the benefits, profits, gains, and advantages which he otherwise might and would have made by carrying on his said trade or business therein, to wit, at, &c.

The pleas were the general issue and the statute of limitations, upon which issue was joined.

The cause came on for trial at *Warwick* in *April* 1829, when an order of *Nisi Prius* was made by the Court, with the consent of the parties, that a verdict should be entered for the Plaintiff for 500*l.* damages, subject to the award of an arbitrator, who was to be at liberty to direct for whom and for what sum the verdict should finally be entered, and to settle all matters in difference between the parties, and order and determine what should be done by either party respecting the matters in dispute.

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The arbitrator, by his award, found the Plaintiff in the action to be the owner and occupier of an ancient water corn mill, situate upon the river *Sherborne*, in the county of *Warwick*; the Defendant *Edward Inge* to be the owner, the Defendant *John Grimmitt* the occupier, as tenant to the said *Edward Inge* of another ancient water corn mill, also situate upon the same river, and higher up the stream than the mill of the plaintiff; that this action was brought to recover a compensation in damages from the Defendants, for that the Defendants cut down and lowered, and kept and continued so cut down and lowered, a part of the bank of the said river, situate and being between the mill of the Defendants and the mill of the Plaintiff, and on a part of the said bank so lowered, built and erected, and kept and continued so built and erected, a certain weir or fletcher, and by that means caused large quantities of the water of the said river, which otherwise would, and always before had, and still of right ought to have flowed to and through the Plaintiff's mill, to flow in a new course or channel, whereby the Plaintiff was deprived of a due supply of water for his said mill; that this action was commenced in *Michaelmas* term 1828, and that that part of the bank of the river situate and being between the said mills was so cut down and lowered as above mentioned, and the said weir or fletcher, built and erected there by the Defendant *Inge* in the month of *June* 1822; that the said bank was kept so cut down and lowered, and the weir or fletcher so kept and continued as aforesaid, by the Defendants, from the month of *June* 1822, up to the commencement of the action; that the part of the bank so cut down and lowered, and upon which the weir or fletcher was built and erected in *June* 1822, then and still was the soil and freehold of the Defendant *Inge*, and was occupied by the Defendant

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Grimmitt at the time of the commencement of the said action, under a demise from the said *Inge*: that at the time when the bank of the river was so cut down and lowered, and the weir or fletcher so built and erected as aforesaid, the mill of the Plaintiff was the property of, and was occupied by one *George Liggins* the father of the Plaintiff; and that the Plaintiff derived his title to the mill from his said father: that the Defendant *Inge*, at the time when he cut down and lowered the bank, and built and erected the said weir or fletcher as aforesaid, had a parol licence to do the same from the said *George Liggins*; and that *Inge* did the same at his own proper costs and expenses: that the lowering or cutting down the said bank, and the keeping the same so lowered and cut down as aforesaid, and the erecting and building the said weir or fletcher, and the keeping the same so built and erected were injurious to the mill of the Plaintiff at the time of the bringing the action, by diverting into another channel the water which was necessary for the proper working of his said mill; and that in the year 1827 the said *George Liggins*, the father of the Plaintiff, being then still in the occupation of the mill now in the occupation of the said Plaintiff, represented and made known to the said Defendants, that the lowering and cutting down the bank, and keeping it so lowered and cut down, and the building the weir, and so keeping it were injurious to him, the said *George Liggins*, in the occupation and enjoyment of his mill, and at the same time called upon the said Defendants to fill up and raise the bank to its ancient and accustomed height, and to pull down or remove the said weir: whereupon the arbitrator awarded, that the verdict already entered up for the Plaintiff should stand, but that the damages should be reduced to 1*s.*; and directed, that the Defendants should, at their own proper costs and charges, raise, elevate, and heighten, the weir or fletcher

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fletcher along the whole length and surface of it, to the height of one inch and a-half above its present height or elevation, and should keep and continue it so elevated and heightened; and that the Defendants should enjoy the weir so elevated and heightened accordingly, and as long as the said weir should be kept and continued so elevated and heightened, without further molestation from the Plaintiff.

In *Easter* term last the Defendants obtained a rule, calling upon the Plaintiff to shew cause why the award should not be set aside. The Court directed that the matter of the award should be argued in the form of a special case; and the question for their opinion was, Whether the award was good in law.

Merewether Serjt. The licence given in 1822, being by parol, was revocable, and after revocation this action lies for a continuance of injury. The Plaintiff's father could not transfer by parol any right over the stream which supplied his mill; the grant of such a right could only pass by deed. In *Hewlins* v. *Shippam* (*a*), where it appeared in evidence that the licence to construct and continue a certain drain was by parol, it was held, that as the right claimed in the declaration was a freehold right, assuming that it was an easement only upon the land of another, and not an interest in the land, it could not be created without deed. If the licence were irrevocable, it would, without adequate consideration, bind the grantor to all risk for the future; but where the licence is only by parol, and without consideration, the grantee ought to be at that risk. If the grantee be led into expense by the licence, his remedy is in equity, not at law. In *Barker* v. *Richardson* (*b*), where lights had been enjoyed for more than twenty years, contiguous

(*a*) 5 *B.* & *C.* 221. (*b*) 4 *B.* & *A.* 579.

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to land which, within that period, had been glebe land, but was conveyed to a purchaser under the 55 G. 3. c. 147., it was held that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. *Winter* v. *Brockwell* (*a*) may be relied on by the other side. But in that case Lord *Ellenborough* was much influenced by the circumstance, that the party had been led into expense. That circumstance, however, does not affect the question in a court of law; for it is clear that the owner of land may recover in ejectment, although buildings may have been erected with his consent. *Webb* v. *Paternoster* (*b*) was also much relied on. But that case only decided, that a licence cannot enure beyond a reasonable time; the *obiter dictum* to be found in it, that an executed licence is not revocable, was not necessary to the decision of the case, and is not warranted by any other authority. Even if the Plaintiff could not revoke the licence to erect the weir, he may still sue in respect of the continuance, for every day's continuance is a new injury. As, if I permit a party to turn out his horse in my park, yet if the horse do me injury, or his presence become afterwards inconvenient, I may revoke my permission. It is true, that in *Tayler* v. *Waters* (*c*), *Gibbs* C. J. referred to *Winter* v. *Brockwell* without disapprobation. But the question in *Tayler* v. *Waters*, was not whether a parol licence was revocable, but whether an opera ticket was an interest in land. And in *Rex* v. *Horndon-on-the Hill* (*d*), Lord *Ellenborough* used language incompatible with the decision in *Winter* v. *Brockwell*. In *Fentiman* v. *Smith* (*e*) it was holden, that where one declared in case

(*a*) 8 *East*, 308.
(*b*) *Palm.* 71.
(*c*) 7 *Taunt.* 384.
(*d*) 4 *M.* & *S.* 562.
(*e*) 4 *East*, 107.

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for obstructing a water-course, upon his possesion of a mill with the appurtenances, and that by reason of such his possession, he had a right to the use of water running in a certain tunnel to the mill, such allegation was not supported by proof that the tunnel was made on the Defendant's land which he had agreed to let the Plaintiff have for that purpose for a certain consideration, but of which no conveyance was made by him to the Defendant, and he had since refused his assent: because the Plaintiff had not the water by reason of his possession of the mill, &c. but by parol licence or contract, which could not pass the title to the land, and as a licence was revocable, and revoked.

Goulburn Serjt. *contrà*. *Winter* v. *Brockwell* is in point for the Defendants, and has never been impeached. In that case it was held, that a parol licence to put a sky-light over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window), could not be recalled at pleasure, after it had been executed at the defendant's expense; at least, not without tendering the expenses he had been put to; and, therefore, no action would lie, as for a private nuisance, in stopping the light and air, &c., and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light. That decision has been confirmed by *Tayler* v. *Waters*, recognised by *Bayley* J. in *Hewlins* v. *Shippam*, and is borne out by the decision and language of the Court in *Webb* v. *Paternoster*. It is also referred to in 1 *Wms. Saund.* 300 *d.* note, last edition, and 2 *Wms. Saund.* 113 *a.* note *a*. *Rex* v. *Horndon* does not apply to the question; and *Barker* v. *Richardson* merely decides that the Court will not presume a grant where there is no one who has the power to grant. *Fentiman* v. *Smith* turned wholly on the statute of frauds. In the present

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case there has been no grant of land, nor of any interest, but merely a relinquishment of the Plaintiff's father's claim to more water than was necessary for the purpose of his mill. It is not like a licence to do acts which consist in repetition; as, to walk in park, or use a way.

(Other points were argued, but the Court decided only on the above.)

Cur. adv. vult.

TINDAL C. J. It will be unnecessary on the present occasion to consider more than one of the questions which have been argued at the bar, namely, whether the present action, upon the facts stated in the award of the arbitrator, is maintainable against the Defendants.

The action is, in point of form, an action of tort, and charges the Defendants with wrongfully continuing a certain weir or fletcher, which the Defendants had before erected upon one of the banks of the river, and by that means wrongfully continuing the diversion of the water, and preventing it from flowing to the Plaintiff's mill in the manner it had been formerly accustomed to do.

It appeared in evidence before the arbitrator, that the bank of the river, which had been cut down, was the soil of the Defendants; and that the same had been cut down and lowered, and the weir erected, and the water thereby diverted by them, the Defendants, and at their expense, in the year 1822, under a parol licence to them given for that purpose by the Plaintiff's father, the then owner of his mill; and that in the year 1827, the Plaintiff's father represented to the Defendants, that the lowering and cutting down the bank were injurious to him in the enjoyment of his mill, and had called upon them to restore the bank to its former state and condition; with which requisition the Defendants had refused to comply.

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The question, therefore, is, whether such non-compliance, and the keeping the weir in the same state after, and notwithstanding the countermand of the licence, is such a wrong done on the part of the Defendants as to make them liable to this action.

The argument on the part of the Plaintiff has been, that such parol licence is, in its nature, countermandable at any time, at the pleasure of the party who gave it. That to hold otherwise, would be to allow to a parol licence the effect of passing to the Defendants a permanent interest in part of the water which before ran to the Plaintiff's mill; which interest, at common law, could only pass by grant under seal, being an incorporeal hereditament, and which, at all events, would be determinable at the will of the grantor since the statute of frauds, as being "an interest in, to, or out of lands, tenements, and hereditaments."

If it was necessary to hold, that a right or interest in any part of the water, which before flowed to the Plaintiff's mill, must be shewn to have passed from the Plaintiff's father to the Defendants under the licence, in order to justify the continuance of the weir in its original state, the difficulty above suggested would undoubtedly follow. For it cannot be denied that the right to the flow of the water, formerly belonging to the owner of the Plaintiff's mill, could only pass by grant, as an incorporeal hereditament, and not by parol licence.

But we think the operation and effect of the licence, after it has been completely executed by the Defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burthen of restoring to its former state what has been done under the licence, although such licence is countermanded; and, consequently, that they are not liable to an action as wrong doers, for persisting in such refusal.

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The parol licence, as it is stated in the award of the arbitrator, was a licence to cut down and to lower the bank, and to erect the weir. Strictly speaking, if the licence was to be confined to those terms, it was at once unnecessary and inoperative; for the soil being the property of the Defendants, they would have the right to do both those acts without the consent of the owner of the lower mill. But as the diversion of part of the water which before flowed to that mill would be the necessary consequence of such acts, it must be taken that the object and effect of such licence was to give consent, on the part of the plaintiff's father, to the diverting of the water by means of those alterations.

We do not, however, consider the object, and still less the effect, of the parol licence, to be the transferring from the Plaintiff's father to the Defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment, on the part of the plaintiff's father, that he wanted such water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir or fletcher, which he then consented should be erected by the Defendants. And we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition.

Water flowing in a stream, it is well settled, by the law of *England*, is *publici juris*. By the *Roman* law, running water, light, and air, were considered as some of those things which had the name of *res communes*, and which were defined "things, the property of which belong

belong to no person, but the use to all." And, by the law of *England*, the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he thus appropriates, against any other. *Bealey* v. *Shaw and Others.* (*a*) And it seems consistent with the same principle, that the water, after it has been so made subservient to private uses by appropriation, should again become *publici juris* by the mere act of relinquishment. There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment. Suppose a person, who formerly had a mill upon a stream, should pull it down, and remove the works, with the intention never to return. Could it be held, that the owner of other land adjoining the stream, might not erect a mill and employ the water so relinquished? Or that he could be compellable to pull down his mill, if the former mill-owner should afterwards change his determination, and wish to rebuild his own?

In such a case it would undoubtedly be a subject of enquiry by a jury, whether he had completely abandoned the use of the stream, or had left it for a temporary purpose only; but that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill, for not pulling it down again after notice. And if, instead of his intention remaining uncertain upon the acts which he had done, the former proprietor had openly and expressly declared his intention to abandon the stream, — that is, if he had licensed the other party to erect a mill, — the same inference must follow with greater certainty. Or suppose *A.* authorises *B.*, by express licence, to build a house on *B.*'s own land, close adjoining to some of the windows of *A.*'s house, so as to intercept part of the light; could he

(*a*) 5 *East*, 207.

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afterwards compel *B.* to pull the house down again, simply by giving notice that he countermanded the licence? Still further, this is not a licence to do acts which consist in repetition, as to walk in a park, to use a carriage way, to fish in the waters of another, or the like: which licence, if countermanded, the party is but in the same situation as he was before it was granted; but this is a licence to construct a work, which is attended with expense to the party using the licence; so that, after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a licence to do something that, in its own nature, seems intended to be permanent and continuing. And it was the fault of the party himself, if he meant to reserve the power of revoking such a licence, after it was carried into effect, that he did not expressly reserve that right when he granted the licence, or limit it as to duration. Indeed the person who authorizes the weir to be erected becomes, in some sense, a party to the actual erection of it; and cannot afterwards complain of the result of an act which he himself contributed to effect.

Upon principle, therefore, we think the licence in the present case, after it was executed, was not countermandable by the person who gave it, and consequently that the present action cannot be maintained. And, upon authority, this case appears to be already decided by that of *Winter* v. *Brockwell*, which rests on the judgment in *Webb* v. *Paternoster*. We see no reason to doubt the authority of that case, confirmed, as it since has been, by the case of *Tayler* v. *Waters* in this Court, and recognised as law in the judgment of Mr. Justice *Bailey*, in the case of *Hewlins* v. *Shippam*, in the Court of B. R.

We therefore think the rule for setting aside the award of the arbitrator must be made absolute.

Rule absolute.

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RICHARD BADHAM, and SARAH, his Wife, late SARAH MEE, Widow, SARAH PATIENCE MEE, an Infant, and Others *v.* RICHARD MEE, CAROLINE MEE, JOHN MEE, and Others. *June* 8.

By marriage settlement the husband took an estate for life, with power of appointment to children; remainder to trustees to preserve, &c.; remainder to children in tail in default of appointment; remainder to husband in fee in default of issue.

The husband became bankrupt, conveyed in the usual way all his property by bargain and sale to his assignees, and afterwards executed an appointment to his son in fee, after his own life estate. The assignees sold the life estate to the bankrupt's mother:

Held, that the son took nothing under the appointment, but was entitled to an estate tail under the original settlement.

BY order of the Master of the Rolls the following case was submitted for the opinion of the Court:— *Patience Mee*, widow, deceased, and *Richard Mee* the elder, or one of them, being seised in fee simple of the lands and hereditaments hereinafter mentioned,

By indentures of lease and release, bearing date respectively the 24th and 25th of *April* 1794, the release being made and duly executed by *Patience Mee* of the first part, the said *Richard Mee* the elder, therein described as *Richard Mee*, of the second part; the Rev. *John Durant* of the third part; *Margaret Durant* of the fourth part; the Rev. *John Dudley* and *Abrather Hawkes* of the fifth part; and *Sparry Peshall* and *George Durant* of the sixth part; being the settlement made previous to the marriage of the said *Richard Mee* the elder with *Margaret Durant*, which was afterwards solemnized, the said *Patience Mee* and *Richard Mee* respectively granted, bargained, sold, and released certain lands, tenements, and hereditaments therein particularly described, unto *John Dudley* and *Abrather Hawkes*, in their actual possession then being, to hold the same to them, their heirs, and assigns, to the uses thereinafter expressed, that is to say, to the use of the said *Patience Mee* and *Richard Mee*, their heirs and assigns respectively, according to their several estates and interests in the premises,

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premises, immediately before the execution of the said deed, until the intended marriage between the said *Richard Mee* and *Margaret Durant* should be solemnized, and after the solemnization thereof to the use of the said *Sparry Peshall* and *George Durant*, their executors, administrators, and assigns, for the term of ninety-nine years, upon certain trusts, and subject thereto, to the use of the said *Richard Mee* and his assigns for life, without impeachment of waste; and from and after the determination of that estate by forfeiture or otherwise, to the use of *John Dudley* and *Abrather Hawkes*, and their heirs during the natural life of the said *Richard Mee*, in trust to preserve the contingent remainders thereinafter limited, but nevertheless to permit the said *Richard Mee* and his assigns during his natural life to take the rents, issues, and profits of the said premises to his and their own use; and from and after the decease of the said *Richard Mee*, to the end, intent, and purpose that the said *Margaret Durant* and her assigns, in case she should survive the said *Richard Mee*, should receive and take during the term of her natural life, out of the rents, issues, and profits of the said hereditaments, one annuity or yearly rent charge of 150*l.* payable as therein mentioned, which said annuity was to be in lieu of all dower and thirds; and subject to the said annuity to the use of the said *Sparry Peshall* and *George Durant*, their executors, administrators, and assigns, for and during the term of 600 years, to commence from the day of the death of the said *Richard Mee*, without impeachment of waste, upon certain trusts; and subject thereto, to the use of such one or more of the son or sons of the said *Richard Mee* on the body of the said *Margaret Durant* lawfully to be begotten, and in such shares and proportions, and for such estate and estates in fee simple or otherwise, and under and subject to such charges, provisions, conditions, and agreements

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ments in favour of other the child or children of the said intended marriage, as the said *Richard Mee* in and by any deed or writing, deeds or writings, with or without power of revocation, by him to be duly executed in the presence of two or more credible witnesses, or by his last will and testament in writing, by him to be duly executed in the presence of and attested by three or more credible witnesses, should grant, convey, give, devise, limit, direct, or appoint the said premises, or any part thereof: And for and in default of any such grant, conveyance, gift, devise, limitation, or appointment, and subject thereto, and as to any part or parts of the said premises as should not be disposed of, or when and as the estates thereby limited should respectively fall in, cease and determine, and subject thereto, to the use of the first son of the body of the said *Richard Mee* on the body of the said *Margaret Durant*, lawfully to be begotten, in tail general; remainder to the use of the second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said *Richard Mee* on the body of the said *Margaret Durant* lawfully to be begotten, in tail general; remainder to the use of the right heirs of the said *Richard Mee* for ever. Then followed a power for *R. Mee* to raise 1000*l.* by mortgage for a term, subject to certain conditions and restrictions: the trust of the term of 600 years was declared to be for raising portions for younger children and females, and paying them in the mode therein prescribed: and the indenture contained provisoes that it should be lawful for the said *Richard Mee* and *Margaret Durant* during their joint lives, and the said *Richard Mee*, in case he should survive said *Margaret Durant*, with consent of *Sparry Peshall* and *George Durant*, and the survivor, &c., to be signified as therein mentioned, to convey all or any part of said hereditaments, by way of exchange, for other hereditaments, to be settled to the

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the same uses, or to sell them, applying the money obtained in the purchase of other lands, to be settled to the same uses.

The intended marriage between *Richard Mee* and *Margaret Durant* was duly solemnized. *Margaret Mee*, formerly *Durant*, died, leaving issue of the marriage four children only, namely, *Richard Mee* the younger, *Caroline Mee*, *Sarah Mee*, and *John Mee*; of whom *Caroline Mee*, and *Richard Mee*, the son, respectively attained the ages of twenty-one years before *June* 1829.

On the 12th of *June* 1798, a commission of bankrupt was awarded and issued against *Richard Mee* the elder, under which he was duly found and declared a bankrupt, and *John Hodgetts* and *Thomas Brettell* were appointed assignees of his estate and effects: and by indentures of bargain and sale duly enrolled, and bearing date the 14th of *July* 1798, the major part of the commissioners in the said commission did, so far as they lawfully might, bargain and sell unto and to the use of *John Hodgetts* and *Thomas Brettell*, their heirs and assigns (*inter alia*), the aforesaid lands and hereditaments.

The assignees afterwards contracted with Mrs. *Patience Mee* to sell to her the whole of their estate and interest in the said premises: and accordingly, by indentures of lease and release bearing date respectively the 9th and 10th of *May* 1799, the release, purporting to be made between *John Hodgetts* and *Thomas Brettell* of the first part, *Richard Mee* of the second part, and *Patience Mee* of the third part, it was witnessed, that in pursuance of the said agreement, and in consideration of 440*l.* to the said *John Hodgetts* and *Thomas Brettell*, or one of them, paid by the said *Patience Mee*, they the said *John Hodgetts* and *Thomas Brettell* did, according to their respective estates and interests in the premises, bargain, sell, alien, release, and confirm unto the said *Patience Mee*, and to her heirs

and

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and assigns, all the aforesaid lands and hereditaments, to hold the same unto the said *Patience Mee*, her heirs and assigns, to and for the only proper use and behoof of the said *Patience Mee*, and her heirs and assigns for ever; chargeable, nevertheless, and subject to the contingencies mentioned in the said indenture of settlement.

Mrs. *Mee* died in 1806, having made her will, bearing date the 15th of *December* 1801, and duly executed so as to pass freehold lands by devise: and by that will she disposed of the interest which she took in the said hereditaments under the aforesaid conveyance, in favour of certain persons who were Defendants, or had transmitted their interests to the Defendants in this suit.

By a deed-poll dated the 2d of *January* 1819, under the hand and seal of the said *Richard Mee* the elder, and attested in the manner required for the due exercise of the power reserved to him by the aforesaid marriage settlement, after referring to his said power, and reciting, among other things, that there were then living, issue of the said *Richard Mee* by the said *Margaret Mee* deceased, four children only, viz. *Caroline Mee*, *Richard Mee*, *Sarah Mee*, and *John Mee*, and that the said *Caroline Mee* and *Richard Mee* had attained their respective ages of twenty-one years, the said *Richard Mee* the elder did, in pursuance thereof, direct, limit, and appoint, that from and after the decease of him *Richard Mee* the father, and the determination of his life estate, and the determination of the said term of 600 years, and in the mean time subject and without prejudice to the estate for life of said *Richard Mee*, party thereto, and to the said term of 600 years, and the trusts of the same term as far as they were capable of taking effect, the said lands and hereditaments should remain to the use of the said *Richard Mee* the son, his heirs and assigns for ever, nevertheless charged and chargeable with such sum

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sum and sums of money as should become payable under the appointment thereinafter made; the same to be in satisfaction and discharge of the portions, if any, to which the said *Caroline Mee*, *Sarah Mee*, and *John Mee* were or might be or might claim to be entitled to receive under or by virtue of the before-mentioned indenture of 25th of *April* 1794. And the said *Richard Mee* the father, in exercise and execution of the said power, did also direct, limit, and appoint the sum of 5000*l.* to be raised for and paid to the said *Caroline Mee*, *Sarah Mee*, and *John Mee*, their executors, administrators, and assigns, on the decease of the said *Richard Mee* the father, in the manner therein mentioned.

Some time afterwards *Richard Mee*, the son, died, leaving the Plaintiff *Sarah Patience Mee*, his only child, him surviving.

There being various equitable claims affecting the said lands and hereditaments, the suit was instituted, among other purposes, in order to ascertain the rights and interests of the different parties in the premises. The question for the opinion of the Court was,

What estate from and after the execution of the said deed of appointment of the 2d of *January* 1819 *Richard Mee*, the son, took in the said lands and hereditaments under the said deed of appointment, and the said deeds of the 24th and 25th of *April* 1794, or any or either of them.

Spankie Serjt. for the Plaintiff. The execution of the power by *Richard Mee* the elder, gave his son *Richard* an estate in fee, or, at all events, a base fee. The power was to be executed in favour of children, purchasers under a marriage settlement; and as it did not derogate from or coalesce with the elder *Mee*'s life estate, it was a power in gross, not extinguished by the bankruptcy. Even if under the bankruptcy the commissioners bargained

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gained and sold *Mee*'s contingent remainder in fee still the power did not pass, because a bargain and sale is an innocent conveyance, passing only what the grantor has a right to convey; and a power in gross, a power to be exercised for the benefit of children, does not pass on the transfer of estate. *Mee*'s assignees took what the commissioners had a right to convey, but nothing in derogation of his power to act for the benefit of his children. In *Thorpe* v. *Goodall* (*a*), where Lord *Eldon* discusses the point, a bill was filed to compel a bankrupt to execute, for the benefit of his creditors, a power which he might have executed for his own benefit, and the application was refused. In *Doe* v. *Brittain* (*b*) the bankrupt himself took an interest under the appointment which it was determined he could not withhold from his assignees. But here *Mee*'s ultimate remainder was not to come to him except upon failure of issue; so that the appointment to his son will enure at least as a base fee, and does not affect the ultimate remainder; *Edwards* v. *Slater* (*c*); and every appointment which does not affect the ultimate remainder, in such a case, is good, 4 *Cruise*, 248. It is doubtful whether such a power as this could be destroyed even by forfeiture; for in *Jesson* v. *Wright* (*d*) Lord *Redesdale* says, "How can a man having a power for the benefit of children destroy it?"

*Tadd*y Serjt. *contrà*. The power was extinguished by the bankruptcy, and the appointment is consequently void; or, at all events, the power has not been well executed. By the statutes 13 *Eliz. c.* 7. *s.* 2., 21 *Jac.* 1. *c.* 19. *s.* 12., every interest, power, or

(*a*) 17 *Ves.* 389.
(*b*) 2 *B.* & *A.* 93.
(*c*) *Hard.* 410. 413. *Sugd. on Pow.* 37.
(*d*) 2 *Bligh.* 15. 1st series.

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possibility which the bankrupt could have departed withal, or could have destroyed by recovery or fine, is transferred under the bankruptcy. The question, therefore, is, whether *Mee*, if he had not become a bankrupt, could have cut off or debarred those who now claim under the appointment. Now, in *Smith* v. *Death* (*a*), the case of *West* v. *Birnie* being referred to in argument, the Vice-Chancellor said, — "Every power reserved to a grantee or devisee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and, therefore, in gross, might be extinguished. That such a grantee or devisee could deal with the estate in respect to his freehold interest; and his dealing with the estate, so as to create interests inconsistent with the exercise of his power, must extinguish his power, upon the general principle that a person is not permitted to defeat his own grant. That it made no difference that here the power was a particular power in favour of children; that *King* v. *Melling* (*b*) was a particular power in favour of the wife; that such a power could not be called a trust, for the alleged *cestui que trust* could not compel the execution of it; and being at the option of the grantee for life to exercise or not, any dealing with the estate inconsistent with its exercise must determine his option." This was nothing but an option, for *Mee* was not compellable to execute like a trustee; and with reference to him, the power cannot be deemed a power for the benefit of others, since it was to be exercised in favour of his own children, not in favour of strangers: and in *King* v. *Melling*, a power to make a jointure was held to be destroyed by a common recovery. In that case, the jointure, like the estate to the children in this, was an estate to commence after

(*a*) 5 *Maddock*, 371. (*b*) 1 *Ventr.* 214. 225.

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the determination of the estate for life. *Rainsford* B. said, that the power was annexed to the life estate in privity, and by recovery extinguished. The principle that a bargain and sale is to be deemed an innocent conveyance, does not apply to a bargain and sale under a bankruptcy, because, by the statutes referred to, that conveyance is to have the same effect as a common recovery. If a power of this kind could not be barred, a tenant for life under a marriage settlement could never make a provision for children during his life; *Sugd. Powers*, 78. A settlement made one day, might be revoked under the power the next; and that consideration weighed in *West* v. *Birnie*, where it was held that the power was destroyed. The same point was determined in *Horner* v. *Swan*, before the Master of the Rolls on the 8th of *December* 1823; and the arguments that weighed with him were, — that the donee of the power was not a trustee; that the power was annexed in privity to the estate, though not appendant; and that the donee had a beneficial interest in appointing for wife or children. The same principles are recognised in *Edwards* v. *Slater*, where *Turner* B. says, — "It might be mischievous, if the power were held to be collateral; for then, if the tenant for life should grant a rent charge, and afterwards make a lease, &c., he would avoid his own act. But because it savours of the land, it is gone by the bargain and sale, and passes together with the land, and amounts to a confirmation by reason of the estate in fee expectant." *Littleton*, s. 384. (*Co. Lit.* 236 *b.*) In *Thorpe* v. *Goodall*, Lord *Eldon* seems to have thought the power would pass under the general words "possibility of profit;" and he simply declined to interfere, because he could not see his way to any equity.

But, secondly, supposing the bankrupt to have retained the power, the bankrupt acts passed to the assignees the bankrupt's estate for life, and ultimate

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remainder in fee: if so, could he defeat that remainder, or create a fee in derogation of his own previous grant? It is contended, indeed, that the appointment may enure as a base fee, because the bankrupt's ultimate remainder was not to take effect till the failure of issue in tail. That, however would equally destroy the benefit of the remainder, and avoids the difficulty in form, not in substance; for no remainder can be limited on a base fee, except in certain cases by operation of law. *Lit.* s. 11. *Co. Lit.* 18 *b.* 10 *Rep.* 97 *a.* The appointment must be considered as if it were an estate limited by the original deed, and there a fee could not have been limited on a fee.

Spankie, in reply, was requested to confine himself to the last point. The conveyance to the assignees of the bankrupt's ultimate remainder, was a conveyance of a mere contingency; a remainder in fee after an estate tail. The base fee created by the appointment was analogous to the estate tail, and no more than equivalent to it.

The following certificate was afterwards sent: —

We have heard this case argued by counsel, and have considered the same; and we are of opinion, that from and after the execution of the deed of appointment of the 2d of *January* 1819, *Richard Mee*, the son, did not take any estate in the lands and hereditaments mentioned in the case under the said deed of appointment; but under the deeds of the 24th and 25th of *April* 1794, took an estate tail in remainder, expectant on the determination of the life estate of his father.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. B. BOSANQUET.

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BURLS *v.* SMITH.

June 11.

The subscribers who attend a committee for managing the concerns of an hospital, are liable to the creditors of the hospital.

THIS was an action brought by a baker to recover 52*l.* 11*s.* for bread furnished to the Royal Western Hospital in the year 1829.

At the trial before *Tindal* C. J., *Middlesex* sittings after *Hilary* term, it appeared that the Western Hospital, an eleemosynary establishment, had been set on foot and was supported by voluntary contributions. The affairs of the hospital were conducted by a committee appointed by the subscribers at large, as appeared by a book of regulations printed by the committee. The Defendant was a member of the committee, which he frequently attended, and over which he sometimes presided; and meetings of the committee were holden once a month to audit accounts and issue the directions necessary for the conduct of the hospital. Three committee men in general signed cheques for the payment of the tradesmen's bills. At a meeting on the 21st of *November* 1821, at which the Defendant was present, the steward of the hospital produced his balance sheet, on which was the Plaintiff's name, and the amount of his demand. At a meeting on the 28th following, the Defendant presided. The nurse of the hospital proved that the Plaintiff had furnished the bread, and had delivered his bill to her once a week.

It did not appear precisely who had appointed the Plaintiff to be baker to the hospital, or who had given the order for the bread. Some tradesmen, however, had applied to the committee for their accounts, and to receive orders.

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A pass-book of the Plaintiff's was put in, from which it appeared a little doubtful whether he had given credit to the hospital generally, or to a Mr. *Sleigh*, who had been active in setting the concern on foot early in 1829, but had afterwards surrendered all his interest in it to the subscribers at large.

The Chief Justice left it to the jury to say, whether the Defendant had acted in such a manner as to induce the Plaintiff to believe that he was to look to him and the committee-men for payment; and the jury found a verdict for the Plaintiff for his whole demand.

Spankie Serjt. moved for a new trial, on the ground that a subscriber to an eleemosynary institution is not individually liable for the expenses of the concern, and also that the evidence shewed the credit to have been given rather to Mr. *Sleigh* than to the Defendant, or to the hospital generally.

Jones Serjt. The Defendant, as member of the committee which managed the affairs of the hospital, stands in a very different situation from a mere subscriber who takes no part in the conduct of the concern. Somebody must be responsible to the tradesmen who furnish their goods, and the committee hold themselves out as the parties to be charged by controlling the financial affairs of the body, regulating the daily supplies, and investigating the tradesmen's accounts. In *Delauney* v. *Strickland* (*a*), the Defendant, who managed the affairs of a club, was held responsible to those who furnished supplies. In *Cullen* v. *Duke of Queensberry* (*b*), a bill was filed by the plaintiff against the Duke of *Queensberry* and others, being the "annual committee" at the time of the transaction, of the *ladies' club*, for money ex-

(*a*) 2 *Stark.* 416. (*b*) 1 *Br. C. C.* 101.

pended

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pended in the purchasing of a house, furnishing, and attending it, and other incidental expenses: at a meeting at Lord *Melbourne*'s, 24th of *March* 1775, at which about 100 members were present, they contracted with the plaintiff for the business done, which was the subject of the suit. The defendants, except Lord *Macartney*, 29th of *April* 1775, subscribed an agreement with the plaintiff: afterwards, some part of the plan having varied, Lord *Melbourne* and others, on behalf of themselves and other subscribers, gave a letter of attorney to the plaintiff to act for them, dated 1st of *May* 1775: the defendants insisted that they were not personally liable for the plaintiff's demand; that all that was done was on account of the club, and that sixty persons who had subscribed 4000*l.* to purchase the equity of redemption of the house should all be made parties. For the Plaintiff were cited *Horsley* v. *Bell*, Chancery, 9th of *February* 1778; *Quintine* v. *Yard.* (*a*) For the Defendants, *Knight* v. *Knight.* (*b*) It stood over, the Lord Chancellor shewing, however, an opinion against Defendants.

The Lord Chancellor considering this a new case, and one of considerable importance, was assisted by Justices *Gould* and *Ashurst*. And those Judges most clearly held the Defendants personally liable. The Defendants appealed to the house of Lords, where, after a hearing of three days, judgment was affirmed. [*Alderson* J. referred to *Eaton* v. *Bell* (*c*).]

Spankie. In *Cullen* v. *The Duke of Queensberry*, there was an express contract, and the *Ladies Club* was not an eleemosynary institution. It would be very injurious to the interests of charitable or religious societies, to hold

(*a*) 1 *Eq. Abr.* 74.
(*b*) 3 *P. Wms.* 331.
(*c*) 5 *B. & A.* 34.

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the members composing them individually liable for the expenses of the society. Few would become members of bible societies if liable to be arrested for the bibles furnished. In *Eaton* v. *Bell*, where an inclosure act empowered the commissioners to make a rate to defray the expenses of passing and executing the act, and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners; expenses were incurred in the execution of the act before any rate was made; to defray those expenses the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned, on account of the public drainage, and to place the same to their account as commissioners; the bankers, during a period of six years, continued to advance considerable sums by paying those drafts; and it was held, that the commissioners were personally responsible to the bankers for the drafts so made. But here there is no link of communication between the Plaintiff and the committee. The committee assembled to arrange the affairs of the hospital, not to incur personal responsibility, and their acts must be taken according to the manifest intention, unless there be in them a tendency to mislead. Such is the principle laid down with reference to such meetings, by *Parke* J. in *Dickinson* v. *Valpy* (*a*). Here the committee did not hold itself out as responsible, and the Plaintiff ought to have been more vigilant in ascertaining who was to pay. In *Lanchester* v. *Tricker* (*b*), Churchwardens were held liable for certain parish charges, because they had personally given the order. Here no order was given by the Defendant, and an order cannot be implied from the mere circumstance of his attending the committee. [*Gaselee* J. referred to *Doubleday* v.

(*a*) 10 *B.* & *C.* 128. (*b*) 1 *Bingh.* 201.

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Muskett. (*a*)] That was an undertaking for profit, not for charity, and the committee had inserted advertisements in the newspaper. If a member of the committee, who is not proved to have given the order, be held liable, all the subscribers must be equally so; and such a decision will be fatal to these institutions.

Cur. adv. vult.

The Court afterwards said, that on this ground there was no reason for granting a new trial; but as it appeared that the leaves of the Plaintiff's pass-book had been cut, they would send the cause before another jury, on the ground that the verdict was against the evidence.

Rule absolute.

(*a*) 7 *Bingh.* 110.

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June 11.

A part owner of a ship is not necessarily a partner; therefore, a part owner, who as ship's husband incurs the expense of the outfit, may sue the other part owners separately for their respective shares of the expense.

THIS was an action by the Plaintiff, as part owner and managing owner of the ship *Brailsford*, against the Defendant, another part owner of the same ship, for his portion of the balance due to the Plaintiff for the outfit of the ship for several voyages.

The cause having been referred to arbitration, the arbitrator found specially as follows: —

That the Plaintiff was part owner of the ship *Brailsford*, and acted as ship's husband thereof during the several voyages in respect of which the claim in this action was made; that the defendant was also owner of one fourth of the said ship, and interested to the extent

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extent of one fourth in all the said voyages; and that the dealing between the Plaintiff and Defendant in respect of which this action was brought, was upon the footing of the Defendant being owner of one fourth, and interested as aforesaid: He then awarded and adjudged,

That the said Plaintiff do recover against the Defendant in the action the sum of 462*l.* 8*s.* 6*d.*, being the balance due at the time of the commencement of the suit from the Defendant as such owner of one fourth part of the ship *Brailsford* to the Plaintiff as such part owner thereof, for the share of the Defendant of the expenses incurred and paid by the Plaintiff as managing owner or ship's husband as aforesaid, for the outfit of the said ship for four several voyages, being the voyages aforesaid, while the Defendant was such part owner and interested as aforesaid.

No account having been stated or settled between the parties, no express contract to account having been proved before the arbitrator, but all the voyages having been concluded, and the ship sold as thereafter mentioned before this action was brought, if the Court should be of opinion that an action was not maintainable by one part owner against another for the cause and under the circumstances aforesaid, then he awarded that the verdict for the Plaintiff should be set aside, and a nonsuit entered in lieu thereof.

It having been satisfactorily proved, in point of fact, that the Defendant during the time of the incurring of the expenses aforesaid, was owner of one fourth part of the said vessel, and liable to contribute to the same accordingly, the arbitrator further found that one *John Smith*, a *British* subject, was owner of the said ship *Brailsford*, which ship was *British* built, and was duly registered at *Hull* on the 24th of *April* 1811: that the said *John Smith*, on the 15th of *June* 1811, sold one

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one eighth share of the said ship to the Defendant, and certain other shares to other persons; that entries were made of such sales on the certificate of registry, and that it did not appear by the register or certificate of registry that the Defendant ever acquired or had any greater share in the said ship than the one eighth aforesaid: nor had it been made to appear that the Defendant acquired any further share or interest therein in any representative character, or as devisee, or by operation of law: that the said ship was sold by the consent of the Plaintiff and Defendant, among others, on or about the 16th of *August* 1824, the proceeds of the sale were allowed by the Plaintiff against the expenses of the adventure, and that an entry was made on the certificate of registry to the following effect: —"Custom House, *Hull*, 11th of *January* 1825. *Hannah Smith*, *Joseph Peters Smith*, *Robert Helme*, together with *Edward Scoresby Cox*, *Thomas Cox*, and *John Stuart*, executors of *John Smith*, have transferred by bill of sale, dated 16th of *August* 1824, sixty-four shares to *Thomas Pope*, of *Plymouth*, in the county of *Devon*, merchant." And the proceeds of such sale were paid to the Plaintiff on account of his disbursements in respect of such ship, and by him allowed in account.

If the Court should be of opinion that, under the above circumstances, such entries were conclusive evidence of the amount of interest in the said ship possessed by the Defendant at any time between the two periods, then that the verdict for the Plaintiff should be entered for the sum of 231*l.* 4*s.* 3*d.*, and no more, and that the Plaintiff should recover that sum in the action.

Wilde Serjt. having obtained a rule *nisi* to enter up judgment for the Plaintiff for 462*l.* 8*s.* 6*d.*, pursuant to the award,

Jones

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Jones Serjt. shewed cause. Whether the Plaintiff was a partner in the ship, or in the particular adventure of the four voyages, *Bovill* v. *Hammond* (*a*), this action does not lie, unless there has been a balance struck, and a promise to pay the amount. The Plaintiff's remedy is in equity. A part owner is a partner: at all events he may be so; and the dealings between these part owners, the sale of the ship on their joint account, and the allowance of the proceeds of the sale against the expense of the adventure, shew that they shared in profit and loss, which is the test of a partnership. But, according to *Ex parte Christie* (*b*), and *Strelly* v. *Winson* (*c*), a part owner is generally deemed a partner. In *Holderness* v. *Shackels* (*d*), it was held that part owners of a whaling ship had a lien on each others' share of the proceeds of the adventure, for the contribution of each towards the disbursements of the ship, but it was not decided that one could sue the other for his share of such disbursements.

At all events, the Defendant is liable only as the owner of an eighth share; for there is no agreement, actual or implied, to render him liable for a fourth: an eighth only was conveyed to him by the bill of sale; and no contract respecting a ship can be sustained unless in conformity with the register acts. *Brewster* v. *Clarke* (*e*), *Camden* v. *Anderson* (*g*), *Rolleston* v. *Hibbert* (*h*), *Ex parte Yallop.* (*i*) [*Tindal* C. J. He might be registered owner as to one eighth, and lessee as to another.]

Wilde was requested by the Court to confine himself to the first point. A ship's husband is entitled to recover for the expenses of outfit, whether he be part

(*a*) 6 *B.* & *C.* 149.
(*b*) 10 *Ves.* 105.
(*c*) 1 *Vern.* 297.
(*d*) 8 *B.* & *C.* 612.
(*e*) 2 *Merivale*, 75.
(*g*) 5 *T. R.* 709.
(*h*) 3 *T. R.* 406.
(*i*) 15 *Ves.* 60.

owner

owner or not. Those expenses are a separate undertaking, and independent of the profits of the adventure in which the ship is employed. As if one of four owners of a house were to paint or repair it, he might clearly sue the others for their share of the expense. *Ex parte Christie* has no application to the question; and in *Ex parte Young* (*a*) it was held, that part owners of a ship are tenants in common, and not joint tenants.

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TINDAL C. J. On looking at this award, two questions arise: one, Whether an action will lie by one part owner of a ship against another for his share of the expenses of outfit; the other, Whether the Defendant, being in point of fact owner of a fourth, is liable to the expenses in that proportion, although legally entitled to no more than an eighth. And there seems to be no reason for depriving the Plaintiff of the full benefit of the award.

If, indeed, the Plaintiff and Defendant were partners, there is an end of the question; but part owners of a ship are not necessarily partners. If the parties had laid out money on a speculation in goods, the proceeds to be divided on the ship's return, they would have been partners in every sense; but there is nothing here to shew that they were more than part owners, and the question is, Whether, if one lays out money to enable the ship to proceed, he may not sue each of the owners for his share of the expense. There is nothing to shew that the Plaintiff's claim was to depend on the profits of the voyage, or that he was to be deprived of remuneration if the voyage turned out to be without profit. The outfit was a portion of the capital which each was to advance, and if the Plaintiff had lent either of the part owners the capital he was to contribute, that would

(*a*) 2 *Ves. & B.* 242.

clearly

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clearly have formed the ground of a separate claim. It might have been otherwise, if by the course of trade it were the custom for a ship's husband to look to the returns of the ship for the payment of his bill; but no such custom is stated on the award, nor any thing to shew that the Plaintiff and Defendant were partners.

With respect to the second question, it is true that neither at law nor equity can an owner of a vessel claim any other interest than that which appears on the registry; but if a party holds himself out and deals as owner of a fourth, he is liable to others in that proportion.

PARK J. The difficulty has arisen from confounding the character of the parties. The case has been argued as if this were a strict partnership, but it is not so. The Plaintiff lays out his money in furnishing tackle and provisions for the ship, for which, even if he were a partner, he would be entitled to recover the same as any other tradesman. Even in an ordinary partnership, if one of five or six were to advance to each of the others his share of the capital as a loan, he would be entitled to sue him separately; and why not the Plaintiff, for the money he has laid out on the ship? He would be clearly entitled to sue for such expenses if he were not a part owner, and his being part owner does not in this respect alter his situation. There is nothing in the second point.

GASELEE J. The difficulty I have, is to ascertain at what time an undertaking of this nature becomes a partnership. No doubt, if one partner advances capital to another, he may recover it by action; but my difficulty is to know whether the expenses of outfitting a ship should form a portion of the general account to be charged at the end of the voyage, or may be claimed

at

at once. Here there were four outfits; and if they had been on a separate account, they might have been settled at the commencement of each voyage. I feel some difficulty; but no authority has been cited to induce me to differ from the rest of the Court.

BOSANQUET J. I think the Plaintiff is entitled to the full sum given to him by this award. As ship's husband he was agent for the other owners, and a sum is found due to him in respect of the outfit. Before a voyage, it is the duty of each owner to contribute his share of capital for the expenses of the outfit. Here the ship's husband, being a part owner, at the request of the others, advances their share for them: that constitutes a debt which he is entitled to recover, independently of the profits of the voyage. Of those profits we know nothing; but the debt is found; the ship was sold, and the proceeds applied in reduction of the Plaintiff's claim; and whether the interest in the ship was a partnership or not is immaterial, because in either case the proceeds of the sale might properly be applied in reduction of a debt due from the concern.

With respect to the other objection, the arbitrator has found that the Defendant dealt and represented himself as owner of a fourth: if that be so, it is immaterial whether he were such owner or not: having represented himself as such, he is responsible to that extent.

Rule absolute.

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June 15. BOWDEN *v.* HORNE.

A *nolle prosequi* as to part, entered up *after judgment* for the whole, is equivalent to a *retraxit*, and a bar to any future action for the same cause.

THIS cause was tried at the last *Devon* Spring assizes, and a verdict was found for the Plaintiff for 27*l.* 10*s.*, the Judge reserving to the Defendant leave to move to enter a nonsuit, under the following circumstances: —

The Defendant, in *May* 1830, was indebted to the Plaintiff 57*l.* 11*s.* 6*d.*, being the balance of an account for goods sold and work done. He had given the Plaintiff his acceptance for 30*l.* on account, but this acceptance was returned dishonoured.

A bailable writ was issued out of this Court against him, on the 2d of *June* 1830.

The affidavit of debt was for 57*l.*; 30*l.* thereof as due on the bill of exchange, and the rest for goods sold, and work and labour.

The declaration in that action was in *assumpsit*, and contained a count on the dishonoured bill, counts for goods sold, work and labour, the money counts, and an account stated.

No order for particulars of demand was obtained, nor were particulars given in that action. The Defendant suffered judgment by default for want of a plea.

Interlocutory judgment having been signed on the 3d of *July* 1830, no further proceedings were had thereon until the latter end of the long vacation of 1830, when, immediately previous to *Michaelmas* term, the Plaintiff's attorney, in order to avoid the delay of a writ of enquiry, and fearing a bankruptcy by the Defendant, obtained a rule to compute on the bill of exchange only. In pursuance of this rule, on the 9th of

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of *November* last, the Plaintiff's costs were taxed, and final judgment signed for 51*l.* 17*s.* including only the amount of the bill and interest. The Plaintiff had not, at this time, entered a *nolle prosequi* to any of the counts contained in the declaration; and his costs were taxed according to the length of his whole pleadings.

As by the course thus adopted, the Plaintiff did not obtain payment of his whole demand, and as the Defendant continued solvent, the Plaintiff directed his attorney to commence a second action for the balance. The Plaintiff's attorney, accordingly, on the 18th of *November* 1830, issued a serviceable *capias* against the Defendant.

Particulars of demand in this second action having been furnished by the Plaintiff, the Defendant's attornies applied by summons to a Judge at chambers to stay proceedings on payment of the debt sued for, namely 27*l.* 11*s.* 6*d.*, without costs. The learned Judge, after hearing the affidavits on both sides, refused to make any order, particularly as a demand had been made and refused.

The Plaintiff declared, in this second action, on the common counts for work and labour, goods sold, the money counts, and account stated; and the Defendant pleaded the general issue only.

The Defendant's attorney, on the 25th of *February* last, obtained a Judge's order on the Plaintiff to carry in and docket the judgment in the first action; and accordingly, on the 4th of *March* last, the judgment was entered up and docketed as if a *nolle prosequi* had been entered to the counts not on the bill.

The entry of such judgment, after setting out the count on the bill of exchange, goods sold, work and labour, the money counts, and account stated, was as follows: — "And hereupon, as to the second and subsequent counts of the declaration, the said Plaintiff

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saith that he will not further prosecute his suit against the said Defendant, in respect of the promises and undertakings in the said second and subsequent counts of the said declaration, or any of them; therefore, as to the said promises and undertakings in the said second and subsequent counts of the said declaration, let the said Defendant be acquitted and go thereof without day, &c. And the said Defendant, in his proper person, comes and defends the wrong and injury when, &c., and says nothing in bar or preclusion of the said action of the said Plaintiff in the said first count of the said declaration mentioned, whereby the said Plaintiff remains therein undefended against the said Defendant, wherefore the said Plaintiff ought to recover against the said Defendant, his damages on occasion of the premises; and the said Plaintiff prays judgment and his damages by him sustained, on occasion of the not performing of the said promise and undertaking in the said first count mentioned to be adjudged to him; and because it is suggested and proved, and manifestly appears to the Court here, that the said Plaintiff hath sustained damages on occasion of the not performing of the said last-mentioned promise and undertaking, to the sum of 30*l.* 14*s.* 4*d.*, besides his costs and charges by him about this suit in that behalf expended, therefore it is considered that the said Plaintiff do recover against the said Defendant his damages aforesaid, to wit, the said sum of 30*l.* 14*s.* 4*d.*, and also 21*l.* 2*s.* 8*d.* for his costs and charges by the Court of our said Lord the King now here adjudged to the said Plaintiff with his assent, which said damages, costs, and charges, in the whole amount to 51*l.* 17*s.*, and the said Defendant in mercy, &c."

An examined copy of this judgment was put in on the trial of the cause.

On the part of the Defendant, it was contended the action

action did not lie after the *nolle prosequi* entered in the former cause.

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Stephen Serjt. accordingly obtained a rule *nisi* to enter a nonsuit on that ground.

Russell Serjt. shewed cause. The nature and extent of a *nolle prosequi*, which is the form of the judgment in the present case, is now sufficiently understood. The doctrine laid down by the Court in *Cooper* v. *Tiffin* (*a*) has not, in modern times, been disputed; and there it was said, that "the case of a *nolle prosequi* could not be distinguishable in reason from that of a discontinuance, for that in this as well as in that, the party might afterwards commence another action for the same cause." It can never be urged, in direct opposition to the principle of law laid down in *Cooper* v. *Tiffin*, that the *nolle prosequi* on the judgment roll in this cause can operate as a release or discharge of the action, or as an absolute bar to any future action for the same cause. The Plaintiff, therefore, is not barred from a renewed action, on the ground that he *might* have given evidence and recovered for the same matter in a former action. It is established by *Seddon* v. *Tutop* (*b*), that points on which no evidence has been given may be contested in another action; and the law of that case was recognized by *Best* C. J. in *Stafford* v. *Clark* (*c*), which decides that a judgment which is not pleaded, cannot operate as an estoppel, but is merely evidence on the general issue to the jury. On the general issue here the judgment could only have been available as evidence of payment or satisfaction of the present demand; whereas it shews the very reverse. If it were intended to say that the judgment, such as it is, though it does not prove pay-

(*a*) 3 *T. R.* 511.
(*b*) 6 *T. R.* 607.
(*c*) 9 *Moore*, 738. 2 *Bingh.* 377.

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ment or satisfaction, yet operated as an estoppel, it ought to have been pleaded.

An award comes within the same principle. An award, although under a submission of *all matters in difference*, will not be conclusive upon any matter which was not contested before the arbitrator. And the arbitrator may be examined, in order to prove that no evidence was given upon a particular subject. 2 *Stark. Evid.* 139.

Lord Bagot v. *Williams* (*a*), the case which may be relied upon on the other side, is clearly distinguishable. In that case it appeared at the trial, that the defendant had received on account of the plaintiff, and as his steward, different sums of money at different times; and that, on the investigation of the accounts, the plaintiff found there was due to him a much larger sum than that for which he had declared in an inferior court; but that he had proceeded for the smaller sum, under the belief that the defendant had no available property beyond that amount. It was held, that all the sums which the plaintiff knew the defendant had received at the time when he commenced the action in the inferior court, were to be considered as causes of action, in respect of which he had declared and recovered the judgment. But the action in the inferior court was brought on a single account, whereas the Plaintiff here had several causes of action in the first suit.

Stephen. The recovery in the former action, coupled with the *nolle prosequi* as to a part, is a bar to the present action: and it would operate with great hardship on defendants if the law were otherwise; for they might always be harassed with several actions instead of one. *Seddon* v. *Tutop* is distinguishable, on the ground that the Plaintiff in the present case entered the *nolle pro-*

(*a*) 3 *B.* & *C.* 235.

sequi

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sequi as to part, after taking judgment for the whole. His case, therefore, is more like that of *Lord Bagot* v. *Williams*, where the plaintiff, knowing he had a claim to a greater amount, elected to sue for less. A *nolle prosequi* as to part is equivalent to such an election; in other words, to a *retraxit*, or a *remittitur* after judgment by default. In *Beecher's* case (*a*), indeed, the Court resolved that a *retraxit* cannot be, unless the plaintiff or defendant be in court in proper person, for the entry is, *quod querens in propriâ personâ suâ venit et dicit, quod ipse placitum suum prædict' ulterius prosequi non vult, sed abinde omnino se retraxit,*" &c. But other forms of a judgment of *retraxit* are given in the same case (*b*), which shew that the express word *retraxit* is not essential to the judgment, but that it may be supplied by *nolle prosequi*, which then operates as a perpetual bar. This doctrine has indeed been questioned in more recent times; but it is to be found in *Co. Lit.* 139 *a.* and is confirmed in *Sands* v. *Brocas* (*c*), and 2 *Lil. Pr. Reg.* 218. Serjt. *Williams* has drawn too strong an inference from the cases cited in 1 *Wms. Saund.* 207 *n.* Those cases were chiefly actions of tort; and in *Noke* v. *Ingham* (*d*) the opinion as to the effect of a *nolle prosequi* was extrajudicial. But even if a *nolle prosequi* be not a bar when entered to the whole cause of action, because the Defendant gets his costs, and is in no worse condition by the second action, it is a bar when entered to a part only, and the Defendant obtains no costs; and the difference may be observed in the language of the entries. *Tidd's Append.* 274. *Stafford* v. *Clark* is conclusive to shew that such a defence may be given in evidence under the general issue.

Cur. adv. vult.

(*a*) 8 *Rep.* 116 *a.* *Cro. Jac.* 211. *S. C.*
(*b*) 8 *Rep.* 123 *b.*
(*c*) 2 *Leon.* 177.
(*d*) 1 *Wils.* 90.

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TINDAL C. J. This case comes before the Court upon a motion for leave to set aside a verdict for the Plaintiff, and to enter a nonsuit, on the ground that the Defendant has suffered judgment by default in a former action, brought as well upon a bill of exchange, as upon counts which comprise the same causes of action as the present declaration; after which judgment by default, the Plaintiff entered upon the record a *nolle prosequi* as to the counts which form the declaration in the present action.

It is contended by the Plaintiff, that the effect of a *nolle prosequi* differs from that of a *retraxit*, in that the former is no bar to a future action, which the latter is confessedly allowed to be; and in support of that distinction, the several authorities which are collected in the note of Mr. Serjeant *Williams* in 1 *Saund. Rep.* 207. are relied upon for the Plaintiff.

It is important, however, to advert to a distinction between the present case and all those which are referred to in that note.

The *nolle prosequi*, in all those cases, is entered by the plaintiff either before or after verdict; but in no one of those cases is there a *nolle prosequi* after *judgment* for the plaintiff.

In the present case, the interlocutory judgment was entered generally, to the whole declaration, that the Plaintiff ought to recover his damages by reason of the not performing the several promises and undertakings in the declaration mentioned: but because it is unknown, &c. And the entry of the *nolle prosequi* as to the several counts in the declaration after the first, is this, that the Plaintiff freely in Court confesses that he will not further prosecute his suit as to the promises and undertakings in those counts mentioned. Therefore, as to the damages in those counts, let the Defendant be acquitted, and go thereof without day.

Now,

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Now, after the Plaintiff has obtained a judgment, this entry comes much more near in form to a *remittitur* after a judgment by default, than to the ordinary entry of a *nolle prosequi*; for in the case of a *remittitur* of part of the damages, the entry is, "and hereupon the said Plaintiff freely here in Court remits to the said Defendant all damages sustained by him the said Plaintiff by reason of the not performing the several promises and undertakings in the two last counts of the declaration mentioned; therefore let the Defendant be acquitted of such damages so remitted as aforesaid, and go thereof without day," &c.

And as the judgment approaches so near in form to that of a *remittitur*, we think ourselves bound to give it the same effect, which is that of a final giving up of the damages by matter of record. It is put upon the record in the same place as a *remittitur*, namely, after the plaintiff has obtained judgment. In both instances the nature of his original demand is changed, — *quia transit in rem judicatam.*

The entry, both in this case and that of a *remittitur*, is expressed in terms equally operative.

The reasons given in one of the authorities referred to, that a *nolle prosequi* is not final, *viz.*, that the plaintiff pays costs under the statute of *Elizabeth*, and therefore ought not to be deprived of a second action where he has misconceived his first, will not apply to this case, where the *nolle prosequi* goes to part only, and the Plaintiff is not liable to the payment of costs of that part; and if the Plaintiff had inadvertently entered this *nolle prosequi* in its present form, without foreseeing the effects of it, and had applied to the Court to relieve him from it, no doubt, upon proper terms, he would have been allowed to do so.

At present it appears to the Court, that after the Plaintiff has obtained a judgment in his favour, and

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has given up the damages upon the record in such terms as the present, he has precluded himself from suing again for the original cause of action, as upon a simple contract, and that such evidence was admissible under the general issue.

We therefore think the rule for entering a nonsuit should be made absolute.

Rule absolute.

June 13.

DOE dem. PEARSON *v.* RIES.

The Defendant not denying an imputation that he had instigated a servant to steal a lease material to the determination of the plaintiff's cause, the Court made absolute a rule for giving secondary evidence of its contents.

WILDE Serjt. obtained a rule *nisi* for giving in evidence an examined copy of the enrolment of a lease material to the determination of this cause, on an affidavit which stated, that the original had been stolen from the lessor of the Plaintiff by a servant, at the instigation of the Defendant, who either had it in possession or knew where it was.

Storks Serjt. shewed cause; but his affidavit containing no denial that his client had the deed or knew where it was, the Court made the rule

Absolute.

LONERGAN and Another *v.* The ROYAL EXCHANGE Assurance.

A RULE had been obtained, calling on the prothonotary to review his taxation in this cause. The question involved in the rule was an item of 533*l.* which the Plaintiffs claimed for the expenses and loss of time of a witness in his voyage from the *Havannah* to this country, his detention here, and return, and which the prothonotary had disallowed.

1. A successful party is entitled to the expense of a foreign witness material to his cause, although such witness be not accessible by subpœna.

2. He is also entitled to the expense of detaining such witness in this country to await the trial of the cause, although opportunity is afforded of examination upon interrogatory.

The action was brought to recover an average loss on a policy of assurance on a cargo of sugars shipped on board the *Chauncy*, Captain *James Moffatt*, on a voyage from the *Havannah* to *Gibraltar* and *Malaga*. The Plaintiffs insured the sum of 4150*l.* with the Defendants, 2000*l.* with the *Patriotic* Assurance Company, and 500*l.* with the underwriters at *Lloyd*'s, on the same goods.

The ship sailed on the 27th of *October* 1827, from the *Havannah*, bound to *Malaga*; on the 28th sprung a leak, and was towed back to the *Havannah* by a king's ship, and run ashore on the 29th.

The action was commenced in *Hilary* term 1828.

The Defendants immediately filed a bill in equity against the Plaintiffs at law, praying a commission for the examination of witnesses at the *Havannah*, *Matanzas*, and other parts beyond sea, and for an injunction.

An appearance was entered to this bill; and on the 30th of *June* an injunction issued from the Court of Exchequer to restrain the Plaintiffs in this action from commencing or prosecuting any action or actions against the corporation touching the matters in the bill mentioned; and it was ordered, that they should wholly desist

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desist from the commencing or further prosecuting any such action as aforesaid, and all manner of proceedings thereon, until the coming in of the answer, and the Court should further order.

The answer of *Lonergan* was filed on the 15th of *August* 1828.

On the 12th of *November* 1828, the Plaintiffs obtained an order *nisi* to dissolve the injunction, the answer having come in.

On cause being shewn, on the 21st of *November*, the Court discharged the order *nisi*, and gave the Defendants leave to send out commissions for the examination of witnesses, to the *Havannah*, and the injunction was continued. In the order then drawn up, "It appearing to the Court that *James Moffatt*, who was captain of the ship *Chauncy* in the pleadings mentioned, on the voyage therein also mentioned, was then in this country for the purpose of giving his testimony upon the trial of the action, it was further ordered by the Court, that the Defendants should be at liberty to examine the said *James Moffatt* on interrogatories in the said action, notwithstanding the injunction of this Court, the Plaintiffs being at liberty to cross-examine the said *James Moffatt*; and that the said Plaintiffs, if necessary, should consent to an order to be made in the said action, at the instance of the said Defendants, for the said Defendants to be at liberty to read the depositions of the said *James Moffatt* to be taken as aforesaid as evidence on their behalf upon the trial of the said action, the Plaintiffs being at liberty to read the cross-depositions of the said *James Moffatt* to the cross-interrogatories exhibited by them as evidence on their behalf upon the said trial."

Commissions were sent out to the *Havannah* on the part of the corporation. These not having returned on the 7th of *December* 1829, the Plaintiffs moved to dissolve

solve the injunction; and by an order dated the 10th of *December* 1829, it was ordered, that unless the commissions returned by the eighth day of *Hilary* term, the injunction was then to stand dissolved.

The commissions not being then returned, the company paid the loss.

The Plaintiffs at law wrote to the *Havannah* for the attendance of the witness Captain *Moffatt*, several times after the commencement of the action, and before the issuing of the injunction, but never examined him pursuant to the order of the Court of Exchequer.

The witness was applied to in *Matanzas* in *September* 1828, to go to *London* to attend the trial of the cause. He sailed on the 17th of *September*, arrived on the 13th of *November* at *Liverpool*, remained in *London* till the 17th of *February* 1830, and claimed for his return voyage two months.

The Plaintiffs' attorney deposed, that from the leak, which caused the loss of the ship *Chauncy*, having occurred only a few hours after her sailing on the voyage in question, as appeared by the master's protest, the question of seaworthiness in this cause was a nice and critical question, and, therefore, deponent deemed it unsafe to trust the trial of the cause to written depositions, so long as he could prevail on the captain to remain in *England* to give his evidence personally on the trial before a jury; inasmuch as the demeanour and manner of Captain *Moffatt's* giving his evidence before a jury might have great weight with a jury, in addition to his intelligent and gentlemanly appearance.

Taddy and *Spankie* Serjts., who shewed cause in *Easter* term last, contended, that the action never having been at issue, and notice of trial never having been given, the Plaintiffs were not entitled to send for any witness at the expense of the Defendants: that no subpœna could have

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have been issued against the witness to compel attendance, which is a test to judge of the right to charge:

That the Plaintiffs had no right, after the injunction granted by the Court of Exchequer, to detain any witness at the expense of the Defendants; and that, in any event, the Defendants could not be liable for the detention of the captain after the date of the order of Court giving liberty to examine him on interrogatories; his detention after that time being a wilful and unnecessary detention by the Plaintiffs. They might have examined him by interrogatory; and the Defendants were not to pay for the effect which might have been produced by the gentlemanly appearance of the witness in the box.

TINDAL C. J. If the witness had been sent for rashly, the expenses which have been claimed ought not to be allowed. But the Plaintiffs were not bound to expect that the injunction would continue, and were entitled, in the exercise of a prudent discretion, to send out to the *Havannah* for the witness in question; nor, although the Defendants had obtained a commission to examine witnesses, were the Plaintiffs bound to examine a principal witness, under that commission or upon interrogatory, when they had him corporally here. They might reasonably prefer that his evidence should be given in open court, where it could be obtained in a more full and perfect manner. We think, therefore, that a reasonable allowance should be made for the expense of this witness, and the rule for a review of the taxation must be made

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Same *v.* Same.

June 13.

Allowance may be made in costs for loss of time to a foreign witness necessary to the success of the cause, who is not accessible by subpœna, and refuses to attend without compensation.

UPON reviewing his taxation in pursuance of the preceding rule, the prothonotary, out of 533*l.* 14*s.* claimed for the witness *Moffatt*, disallowed 212*l.* 10*s.*, charged as a compensation for loss of time from the 17th of *September* 1828 to the 17th of *February* 1830, at 12*l.* 10*s.* a month; whereupon

Wilde Serjt. obtained a rule *nisi* for another review of the taxation, upon an affidavit that *Moffatt* was by birth an *American* subject, and before he would consent to come to *England* as a witness for the Plaintiffs, the Plaintiffs' agent undertook that he should be paid for his loss of time in going to *England*, remaining there, and returning, and for his board, lodging, and all expenses.

Taddy and *Spankie* Serjts., who shewed cause, relied on the general rule that compensation for loss of time is not allowed in costs to any but medical men and attornies. *Moor* v. *Adam* (*a*), *Lowry* v. *Doubleday* (*b*), *Willis* v. *Peckham* (*c*), *Severn* v. *Olive* (*d*). The circumstance that the witness was a foreigner, makes no difference; for in *Severn* v. *Olive*, one of the scientific witnesses, came from *Glasgow*, a place out of the jurisdiction of the Court. He might be considered, therefore, in the same predicament as a foreigner; and yet the charge for his loss of time was disallowed. *Schimmel* v. *Lousada* (*e*), *Sturdy* v. *Andrews* (*g*), *Tremain* v. *Barrett*,

(*a*) 5 *M.* & *S.* 156.
(*b*) 5 *M.* & *S.* 159. (*n.*)
(*c*) 1 *B.* & *B.* 515.
(*d*) 3 *B.* & *B.* 72.
(*e*) 4 *Taunt.* 695.
(*g*) 4 *Taunt.* 697.

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rett (*a*), and *Tremain* v. *Faith* (*b*), are all anterior to the cases relied on; and it does not appear clearly in any of them, that costs were allowed expressly for loss of time, but rather the expenses incurred by detention. In *Cotton* v. *Witt* (*c*), it was established that the costs of bringing a necessary witness from abroad are to be allowed, but not the costs of his return.

Wilde. The present question, as far as regards a foreign witness, was not decided in *Severn* v. *Olive*; for the charge contested in that case was an expense incurred by long scientific experiments, and it was to that charge the attention of the Court was principally directed. In *Moor* v. *Adam*, the charge for the time of the foreign witnesses was only disallowed under the peculiar circumstances of the case, it appearing, by affidavit, that the necessity of their attendance was very disputable; but Lord *Ellenborough* said, "I do not think that the Court is called upon to lay down any rule peremptorily, that in no case whatever, where a witness comes from abroad, shall there be an allowance made to him for loss of time." There is a manifest distinction between witnesses who live within the jurisdiction of the Court, and who may be compelled by *subpœna* to attend, and witnesses who live abroad, and whose attendance the party may have no means of securing, except by undertaking, as here, to make them a compensation for loss of time. To refuse generally to make an allowance in costs for such a payment would, in many instances, operate as a complete denial of justice.

TINDAL C. J. We are not called on to lay down a general rule, that in all cases where a party is obliged

(*a*) 6 *Taunt.* 88. (*b*) 6 *Taunt.* 92. (*c*) 4 *Taunt.* 55.

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to have recourse to a foreign witness, he may, if he succeed, call on the opposite party to pay for the witness's loss of time: still less are we called on to say that in any such case the losing party is bound to pay the full amount paid by the successful party. It must be ascertained what it is reasonable the losing party should pay. If there had been any general rule contrary to this, I would not have departed from it; but from what Lord *Ellenborough* said in *Moor* v. *Adam*, it seems there is no such general rule: and the question is, whether, a foreign captain having refused to come unless compensated for loss of time, the expense falls on the Defendant: I am of opinion it does. The case of *Severn* v. *Olive* does not apply. In that case the claim was for expenses incurred to qualify witnesses for a particular trial. But the general rule has been, that where witnesses attend under a subpœna, none receive any allowance for loss of time except medical men and attornies. If that rule were to undergo revision, I cannot say it would stand the test of examination. There is no reason for assuming, that the time of medical men and attornies is more valuable than that of others whose livelihood depends on their own exertions. But that rule is not applicable to the case of a foreign witness, who may refuse to attend if the terms he proposes are not acceded to. If he asks only what is reasonable, I cannot see why it should not be allowed, and be charged to the unsuccessful party. This case, therefore, must go back to the prothonotary, to allow a reasonable sum for the time of the foreign witness.

PARK J. In *Moor* v. *Adam* it was stated, that upon process in this country, allowance for time is only made to medical men and attornies. A rule which appears to be hard and partial; for time to a poor man is of as much importance as to an attorney. But the question

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question is, whether this case falls within that rule. It appears to me that the circumstances are such as to take it out of the rule. The party might naturally prefer an examination in open court to an examination upon interrogatory; and as the witness refused to appear except on terms, the party had no alternative but to accede. Without infringing on the general rule, I think this may go back to the prothonotary.

GASELEE J. I have always considered it the general rule not to make allowance for loss of time, except to medical men and attornies. The rule is a hard one, and ought not to be applied to the case of a foreign witness.

BOSANQUET J. As the question is not what the general rule ought to be, but what it is, I have felt some doubt whether the circumstances of this case are such as to form an exception. But it is so proper the allowance should be made, that I am glad the Court has come to that determination, notwithstanding any doubt I may have entertained.

Rule absolute.

The following case, also on the subject of witnesses' costs, was decided in *Easter* term.

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TREGONING *v.* ATTENBOROUGH.

May 9.

In trover a verdict was taken for Plaintiff to the full amount of the goods converted, the Plaintiff consenting to take them back in reduction of damages, upon its being referred to an arbitrator by order of *Nisi Prius*, to ascertain the amount of deterioration, which amount, with the costs in the cause, were to be paid to Plaintiff:

Held, that the expense of witnesses attending the arbitrator were costs in the cause.

THE Plaintiff, who had recovered a verdict in trover with 850*l.* damages, consented that the Defendant should be permitted to deliver up the goods, and reduce the verdict *pro tanto*, it being referred to an arbitrator by order of *Nisi Prius* to find to what amount, if any, the goods had been deteriorated while in the Defendant's possession; which amount, together with the costs of the *cause*, to be taxed, were to be paid to the Plaintiff: the order was silent as to the costs of the *reference*.

The arbitrator enlarged the time twice, and then made a formal award, in which he found the amount of deterioration, and awarded a sum accordingly; but said nothing about costs. The prothonotary, upon taxation of costs, having allowed the expenses of witnesses attending the arbitrator,

Cross Serjt. obtained a rule *nisi* for a review of the taxation, on the ground that, under the foregoing rule, the Plaintiff was only entitled to costs in the cause, and not costs occasioned by the reference.

Wilde Serjt., for the Plaintiff, contended that these were, in effect, costs in the cause, the reference having been submitted to in ease of the Defendant, and the arbitrator having, by the Defendant's consent, stood in the place of a jury.

Cross. A formal award, made upon several hearings, is not like a referee's certificate of the amount of damages given on the spot after a verdict by consent.

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TINDAL C. J. The costs of this reference were substantially costs in the cause. The verdict gave the Plaintiff the full value of the goods, when, in ease of the Defendant, the Plaintiff offered to take the goods again, upon allowance being made for any damage done to them while in the Defendant's hands. It was clearly for the benefit of the Defendant; and upon his assenting, the arbitrator ascertained the amount of the damage. The costs of attending him were, therefore, costs in the cause; and the rule must be discharged.

PARK J. I think these were costs in the cause under the peculiar circumstances of this case.

GASELEE J. It must be taken that the Defendant consented to ascertain the damage, the return of the goods being for his benefit. I am of opinion, therefore, that these were costs in the cause.

ALDERSON J. This is not like the case of a separate reference. The jury had found a value; the Defendant sought to reduce the payment, by a return of the goods, in specie, and consented to ascertain the damage done. The whole proceeding was for his benefit, and a proceeding in the cause.

Rule discharged.

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June 13.

An agreement that Defendant, a moderately skilful dentist, would abstain from practising over a district 200 miles in diameter, in consideration of receiving instructions and a salary from the Plaintiff, determinable at three months' notice, Held, unreasonable and void.

THE declaration stated, that theretofore, to wit, on the 17th of *April* 1828, in the county of *York*, by certain articles of agreement under seal then and there made, between the Plaintiff, therein described as of the city of *York*, surgeon-dentist, of the one part, and the Defendant of the other part, which articles of agreement, sealed with the seal of the Defendant, the Plaintiff brought into Court, the Defendant, for himself, his heirs, executors, and administrators, did covenant, promise, and agree to and with the Plaintiff, his executors and administrators, that he, the Defendant, should and would well and faithfully serve him, the Plaintiff, as his assistant in the business or profession of a surgeon-dentist, for the term of five years, from the 20th day of *October* then next, according to the terms and conditions thereinafter expressed; and the Plaintiff, in consideration of such service, and of the covenants and agreements on the part of the Defendant, his executors and administrators, thereinafter contained, for himself, his heirs, executors, and administrators, did covenant, promise, and agree, to and with the Defendant, his executors and administrators, that he, the Plaintiff, his heirs, executors, and administrators, should and would well and truly pay or cause to be paid unto the Defendant, his executors or administrators, the salaries or yearly sums following, that is to say, for the first year of the said term of five years the sum of 120*l.*, for the second year the sum of 140*l.*, for the third year the sum of 160*l.*, for the fourth the sum of 180*l.*, and for the fifth and last year the sum of 200*l.*, to be paid half-yearly at the expiration of each successive half year during the said term: and also that he,

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the Plaintiff, should and would, during the said term of five years, teach and instruct the Defendant in the business or profession of a surgeon-dentist, according to the best of his skill and knowledge. And the Defendant did, by the said articles of agreement, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the Plaintiff, his executors and administrators, that he, the Defendant, should and would, for and during the said term of five years, from the said 20th day of *October* thence next ensuing, and fully to be complete and ended, faithfully and diligently serve him, the Plaintiff, as his assistant in the business or profession of a surgeon-dentist, and would not depart from the service of the Plaintiff without giving three calendar months' previous notice in writing to the Plaintiff of such his intention: and that the Defendant should not nor would, at the expiration or other sooner determination of the said term, (provided the Plaintiff were then living, and practising in the said profession or business of a surgeon-dentist,) exercise or practise the profession or business of a surgeon-dentist at or within 100 miles of the said city of *York*, without the previous consent in writing of the Plaintiff, under the penalty of 1000*l.* to be forfeited and paid by the Defendant, his executors or administrators, and to be recoverable in any of his Majesty's Courts of Record at *Westminster*, as and for liquidated damages: that it should and might be lawful for the Plaintiff, at any time during the said term of five years, to discharge and dismiss the Defendant from his service, by giving to the Defendant three calendar months' previous notice in writing for that purpose: as by the articles of agreement, reference being thereunto had, would amongst other things more fully and at large appear: that afterwards, to wit, on, &c. at, &c. the Defendant entered and was received into the service of the Plaintiff under the said articles of agreement, and continued therein for a long space of time,

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time, and until, afterwards, to wit, on the 3d day of *May* 1830, the said term was determined by the said parties. That after the determination of the said term, to wit, on, &c., and on divers other days and times between that day and the day of exhibiting that bill, in the county aforesaid, the Defendant did exercise the profession or business of a surgeon-dentist within 100 miles of the city of *York*, without the previous consent in writing of the Plaintiff, although he, the Plaintiff, was, during all that time, living and practising in the said profession or business of a surgeon-dentist, to wit, at, &c. Whereby an action had accrued to the Plaintiff, to demand and have of and from the Defendant the said sum of 1000*l.* above demanded. Yet, &c.

The Defendant pleaded that it was not his deed.

Upon the trial of the cause before *Littledale* J., last *York* assizes, it was proposed to resist the Plaintiff's claim on two grounds:

First, that the agreement was void, the distance prescribed by the Plaintiff being unreasonable.

Secondly, that even if the agreement were not void, the sum stated in it was a penalty, and not liquidated damages; and, therefore, the Plaintiff was only entitled to recover such damage as he could prove.

The learned Judge was of opinion, that under the plea, *non est factum*, those questions could not be enquired into. He could only try on that plea whether the Defendant had signed the agreement or not, of which fact there could be no doubt; and the jury were directed to find a verdict for the Plaintiff, which they accordingly did; debt 1000*l.*, damages 1*s.*

Wilde Serjt. moved for a new trial, on the ground that evidence ought to have been received as to the amount of damages, for the reason suggested at the trial; and in arrest of judgment, that the agreement between the parties was void, as imposing an unreasonable re-

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straint on the Defendant. (The judgment having been confined to this latter point, the argument on the other is omitted here.)

Russell Serjt. shewed cause. An agreement is illegal and void, if it be generally in restraint of trade: but an agreement for a *partial* restraint of trade is valid, provided there be a sufficient consideration, and it be an honest and upright contract. This was so settled in *Mitchel* v. *Reynolds* (*a*); and is said by Lord *Kenyon*, in *Davis* v. *Mason* (*b*), to have been at rest ever since that case. The restraint here, though extensive, has its limits, beyond which it was easy for the Plaintiff to practise his profession; and the consideration — instruction and communication of the Defendant's skill — is ample. In *Young* v. *Timmins* (*c*), which may be cited on the other side, the agreement was clearly bad and illegal, as tending to leave the party at the entire mercy of his employers, and giving them the power of reducing him to a state of idleness. And *Wickens* v. *Evans* (*d*), which may also be cited, will rather assist the Plaintiff than make against him. But the case of *Mitchel* v. *Reynolds*, as abstracted in 2 *Wms. Saunders*, 156. *n.* is decisive in favour of the Plaintiff; as also the judgment of *Best* J. in *Homer* v. *Ashford* (*e*), where he says, "The law will not permit any one to restrain a person from doing what the public welfare and his own interest require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking *in the kingdom*, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself. But it may often happen that individual interest, and general convenience,

(*a*) 1 *P. Williams*, 181.
(*b*) 5 *T. R.* 118.
(*c*) 1 *Crompt. & Jar.* 331.
(*d*) 3 *Young & Jar.* 318.
(*e*) 3 *Bingh.* 326.

render

render engagements not to carry on trade, or to act in a profession, in a particular place, proper." *Davis* v. *Mason* (*a*) is also in point. There, in consideration that *A.* would take *B.* as an assistant in his business as a surgeon, for so long time as it should please *A.*, *B.* agreed not to practise on his own account for fourteen years within ten miles of the place where *A.* lived, and gave a bond for that purpose: that bond was held good in law. In *Hayward* v. *Young* (*b*), it was held that a bond by an apothecary not to set up business within twenty miles was not illegal as in restraint of trade. In *Bunn* v. *Guy* (*c*), a contract entered into by a practising attorney, to relinquish his business, and recommend his clients to two other attornies, for a valuable consideration, and that he would not himself practise in such business within *London*, and 150 miles from thence, was holden to be valid in law. And though the Master of the Rolls, in *Bozon* v. *Farlow* (*d*), mentions that the Lord Chancellor had doubted of the propriety and legality of some of the conditions in *Bunn* v. *Guy*, and perhaps would not have decreed a specific performance, yet he says that it was ultimately determined that the conditions were not illegal.

Wilde and *Jones* Serjts. in support of the rule. The restraint here is most unreasonable, and the consideration inadequate. The salary allowed by the Plaintiff to the Defendant shews that he was already an able practitioner when he entered into the Plaintiff's service, and not dependent on the Plaintiff for instruction. And the agreement is mischievous to the Defendant and to the public, without being productive of any corresponding advantage to the Plaintiff. The Defendant is estopped

(*a*) 5 *T. R.* 118.
(*b*) 2 *Chitty*, 407.
(*c*) 4 *East*, 190.
(*d*) *Meriv.* 472.

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to practise over a circle the diameter of which is 200 miles, containing nine whole counties, and parts of eight more. If the Plaintiff were to labour night as well as day it would be physically impossible for him to draw all the teeth of such a district. If he leaves home, *York* is without the benefit of his skill; if he remains at *York*, patients may die at *Lancaster*. This is not like a case of trade which a man may conduct by his agents: but the health of the public is endangered, without the possibility of any advantage to the Plaintiff. The agreement, therefore, is unreasonable and void. *Hall* J. said of a similar agreement (2 *H.* 5. fol. 5.), "A ma intent vous purres aver demurre sur luy que le obligation est void, eo que le condition est encountre Common ley, et per Dieu si le plaintiff fuit icy, il irra al prison tanq; il ust fait fine au Roy." And *Parker* C. J., in *Mitchell* v. *Reynolds*, said he thought the occasion excused the vehemence of *Hall* J.

Cur. adv. vult.

TINDAL C. J. Two questions arise upon the deed on which this action is brought, and which is set forth upon the face of the declaration: the first, whether the deed is void, as being in restraint of trade; the second, supposing the deed to be a valid deed, whether the sum therein mentioned to be payable upon breach of the covenant, is a penalty only, or is to be considered as the liquidated amount of damages to be recovered by the Plaintiff.

The deed purports to be an agreement under seal between the Plaintiff and Defendant, whereby the Defendant covenants with the Plaintiff that he, the Defendant, would faithfully serve the Plaintiff as an assistant in the business and profession of a surgeon-dentist for five years. And the said Plaintiff, in consideration of such service, and of the covenants of Defendant, did covenant

covenant with the Defendant to pay him the yearly salaries therein mentioned, and to instruct him in the business or profession of a surgeon-dentist; and the Defendant covenanted that he would, during the said term of five years, faithfully and diligently serve the Plaintiff as his assistant, and would not depart from his service without giving him three calendar months' notice in writing of such his intention; "and that the said Defendant should not nor would, at the expiration or other sooner determination of the said term, (provided the said Plaintiff were then living, and practising in the said business or profession, &c.) exercise and practise the said business or profession at or within the distance of 100 miles of the city of *York*, without the previous consent in writing of the said Plaintiff, under the penalty of 1000*l.* to be forfeited and paid by Defendant, his executors and administrators, and to be recovered in any of his Majesty's Courts of Record at *Westminster* as and for liquidated damages." The deed then contained a clause by which the Plaintiff might determine the service by giving three months' notice in writing.

The first question is, whether this agreement is void in law.

The law upon this subject has been laid down with so much authority and precision by *Parker* C. J., in giving the judgment of the Court of B. R. in the case of *Mitchel* v. *Reynolds* (*a*), which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now, the rule laid down by the Court in that case is, "That voluntary restraints, by agreement between the parties, if they amount to a *general* restraint of trading by either party, are void, whether with or without consideration; but particular restraints

(*a*) 1 *P. Wms.* 181.

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of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract," that is, so as it is a reasonable restraint only, " are good."

The present case does not fall within the first class of contracts, as it certainly does not amount to a general restraint of the Defendant from carrying on his trade or business; he may do so beyond the distance of 100 miles from the city of *York*, and he may do so within that distance after the Plaintiff has ceased to practise. But the question is, whether this contract, which is in particular and partial restraint of trade only, and is made upon some consideration, is made upon a good and sufficient consideration, and is in itself a reasonable restraint of the Defendant's carrying on that trade in which the Plaintiff had agreed to receive the Defendant as his assistant.

Now, as to the consideration, it must be confessed it is very small, compared with the restraint under which the Defendant consents to place himself. The Plaintiff takes the Defendant as his assistant for five years, at a salary of 120*l.* for the first year, to be afterwards increased, with a power to dismiss him at any time by a three months' notice. The Defendant covenants not to exercise or practise the profession within 100 miles of the city of *York*, if the Plaintiff continues to carry on his business of a surgeon-dentist, under the penalty of 1000*l.* The Defendant, in order to be capable of being employed by the Plaintiff as an assistant in a profession requiring skill and experience, and at a considerable salary, must have been a person having some skill and experience, which he had before acquired. At the time of entering into this contract he was at liberty to set up his trade, and endeavour to gain his livelihood, within the city of *York*. But under the present contract, after being employed by the Plaintiff for three months only, and receiving in consequence no more than the sum of 30*l.*,

80*l.*, he was liable to be prevented from carrying on his business, and earning his livelihood, within the large space comprehended within a circle drawn with a distance of 100 miles from the city of *York*. Surely this appears a very slender and inadequate consideration for such a sacrifice.

But the greater question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.

In the case above referred to, Lord Chief Justice *Parker* says, "A restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good;" which are rather instances and examples, than limits of the application of the rule, which can only be at last what is a reasonable restraint with reference to the particular case. In that case the plaintiff had assigned to the defendant the lease of a house in the parish of *A.* for five years, and the defendant entered into a bond conditioned that he would not exercise the trade of a baker within that parish during that term: and the restraint was held good, because not unreasonable either as to the time or distance, and not larger than might be necessary for the protection of the plaintiff in his established trade.

No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond which,

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which, excessive. In *Davis* v. *Mason* (*a*), where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the Plaintiff, 150 miles was considered as not an unreasonable restraint, where an attorney had bought the business of another who had retired from the profession. But it is obvious that the profession of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence or by agents. And unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to shew them reasonable, bad in the eye of the law; and upon the bare inspection of this deed it must strike the mind of every man that a circle round *York*, traced with the distance of 100 miles, encloses a much larger space than can be necessary for the Plaintiff's protection.

The nature of the occupation, which is one that requires the personal presence of the practiser and the patient together at the same place, shews at once that the Plaintiff has shut out the Defendant from a much wider field than can by possibility be occupied beneficially by himself. There is, therefore, on the one hand, no reason why the Defendant should not gain his livelihood; nor, on the other, why the public should not receive the benefit of his skill and industry through so wide a space. The contract appears still further unreasonable on this ground,—as it is to hold good during the whole time the Plaintiff continues to carry on his business, wherever he may be; so that if the Plaintiff removed from *York*, to places where the practice at

(*a*) 5 *T. R.* 118.

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York by the Defendant could not injure him, still the restriction continues.

We therefore think that the contract is one which contains a restraint of the Defendant to carry on his trade, far larger than is necessary for the protection of the Plaintiff in the enjoyment of his trade; and, consequently, that the covenant creating such restraint cannot form the subject of an action.

The opinion we have formed on this point makes it unnecessary that we should discuss the other ground of objection. Indeed, that objection would only go to an assessment of damages by a suggestion of breaches on the present record.

Upon the whole, we think the judgment upon this record should be arrested.

Rule absolute.

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June 13.

COVENANT. The declaration stated that *David Bates*, being possessed of a messuage or tenement for a term, whereof 20 years and 233 days were unexpired, by indenture of 3d of *November* 1814, demised the premises to *James Meek* for twenty-one years

L. being seised in fee, demised to *B.* for twenty-one years from *June* 1814: *B.* demised to *M.* for twenty-one years from *June* 1814 wanting twenty-one days; and then by deed poll granted to *L.* the indenture of lease to *M.*, the premises thereby granted, and the rent reserved, to hold to *L.*, his executors, &c. for the term mentioned in the demise to *M.*; *L.* by lease and release conveyed the premises, the reversion and reversions, rents, issues, and profits, and all his interest, in fee to Plaintiff by way of mortgage; *M.* assigned his term to Defendants by way of mortgage, but Defendants never entered: Held, 1. That Plaintiff might sue Defendants on the covenants in *M.*'s lease; 2. That the deed poll from *B.* to *L.* did not merge the chattel interest in the fee, or suspend the right to sue on the lease to *M.*; 3. That the conveyance in fee from *L.* to Plaintiff passed the chattel interest created by *B.* as well as the fee, and that it was well described in the declaration as an assignment of the chattel interest.

wanting

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wanting twenty-one days, to be computed from *June* 24th 1814, at a rent of 50*l.* a year payable quarterly: that *Meek* covenanted to pay rent, and to repair; and entered. That *Bates*, on the 12th of *February* 1816, by deed poll indorsed on the counterpart of the lease to *Meek*, granted the premises to *John Langdon* and his executors, &c. to have and hold for all the time in the counterpart of lease mentioned.

That by indenture of 15th of *July* 1822, *Langdon* granted, sold, assigned, and set over the premises to the Plaintiff for one year; and by indenture of 16th *July* 1822, *Langdon* granted, sold, assigned, and set over to the Plaintiff all his interest, to have and to hold for all the time or term of years in the said counterpart of lease mentioned, subject to a proviso for redemption upon payment of 700*l.* with lawful interest, upon the 15th of *July* then next ensuing.

That on the 19th of *October* 1816, all the estate and interest of *Meek* came to and vested in the Defendants by assignment thereof; that, on the 29th of *September* 1828, 500*l.* was due for ten years' rent, reserved on the lease from *Bates* to *Meek*; and that the Defendants did not repair the premises after the assignment and during the continuance of the demise.

The Defendants pleaded, first, *non est factum*; ninthly, that all *Meek's* interest did not by assignment legally vest in the Defendants; tenthly, that the rent was paid; and, eleventhly, that the premises were not out of repair. Upon which pleas issue was joined.

The second and following pleas, to the eighth inclusive, upon which various issues of fact were taken, stated matters in bar of the action, which in substance amounted to this: that *John Langdon*, being seised in his demesne as of fee in the premises in question, by indenture of the 5th of *July* 1814, demised them for twenty-one years from *June* 24th, 1814, to *Bates*, who entered

entered and was possessed; that *Bates*, being so possessed of the premises, by indenture of the 3d of *November* 1814 (set out on oyer), demised them to *Meek* for the residue of his term therein, excepting the last twenty-one days. That at the time of the execution of the deed poll of the 12th of *February* 1816 (also set out on oyer), *Langdon* still continued seised in fee of the reversion, expectant on the determination of *Bates*'s lease; and that *Bates* did, by the deed poll last referred to, surrender up to *Langdon*, who accepted the same, the next immediate reversion, expectant on the determination of *Meek*'s under-lease (to which the covenants in his lease were incident); whereby, as it was alleged upon the pleadings, the said immediate reversion became *merged* in *Langdon*'s fee.

In the fourth plea, the deed poll was stated according to its terms, and not according to the legal effect which the Defendants contended it bore; and it was alleged in that plea, as a legal inference, that all rights of action upon the covenants in the lease of 3d of *November* 1814 became thereby suspended. By that deed *Bates* granted, sold, assigned, transferred, and set over to *Langdon*, his executors, administrators, and assigns, the indenture of the 3d of *November* 1814, and the premises thereby granted, and all his estate, right, title, interest, time, and term of years then to come and unexpired, possession, property, benefit, claim, and demand whatsoever of, in, and to the same premises, or any part thereof, and the rent reserved by virtue of the said indenture, or otherwise howsoever, to have and to hold the said messuage or tenement and premises unto the said *John Langdon*, his executors, administrators, and assigns, from thenceforth for all such time and term therein as in the said indenture of the 3d of *November* 1814 is mentioned. To that plea there was a demurrer, and a joinder in such demurrer.

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The demurrer was first argued by *Scriven* Serjt. for the Plaintiff, and *Taddy* Serjt. for the Defendants, in *Easter* term 1829, when the Court took time to consider, and ultimately ordered a further argument.

In *Easter* vacation 1829, the cause went to trial on the ten issues of fact, when a special verdict found, and set out in *hæc verba*, the deeds of the 15th and 16th of *July* 1822, under which the Plaintiff derived title in the declaration, and which appeared to have been a mortgage in fee by bargain and sale for a year, and release from *Langdon* to the Plaintiff; by the release, *Langdon* granted, bargained, sold, aliened, released, and confirmed to *Burton* the premises in the occupation of *Meek*, together with all easements, profits, commodities, emoluments, advantages, and appurtenances whatsoever to the same belonging, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the same, and of every part and parcel thereof, and all the estate, right, title, interest, use, trust, possession, property, claim, and demand at law and in equity of him, *Langdon*, in the same, to have and to hold to *Burton*, his heirs and assigns for ever. There was a proviso for reconveyance to *Langdon* if he should pay *Burton* 700*l.*, and interest, on the 15th of *July* 1823. The assignment of the 19th of *October* 1816 from *Meek* to the Defendants was then set out, whereby, after reciting the lease from *Bates* to himself, he assigned to the Defendants all his estate and interest in the premises, subject to the rent and covenants, upon trust that they should permit *Meek* to occupy and enjoy the premises until demand should be made of payment of the sum of 420*l.* and interest, upon payment of which sum the assignment should be void; and upon further trust, that if default should be made, the Defendants might enter, and sell and dispose of the term, and pay them-

themselves the said sum of 420*l.*, and all arrears of interest. The special verdict further found, that no demand had been ever made for payment of the sum of 420*l.* and interest; that *Meek* had continued in possession from the time of executing the assignment; that the Defendants had never entered, nor ever become actually possessed of the premises, or in any manner acted upon the said indenture of the 19th of *October* 1816, otherwise than by receiving that indenture, and the indenture of demise to *Meek*, into their possession, and retaining them ever since.

On the tenth and eleventh pleas, damages were assessed for the Plaintiff at 312*l.* 10*s.* and 180*l.*

In *Trinity* term 1829, *Taddy*, pursuant to leave reserved at the trial, moved to enter a nonsuit on the ground of a variance; the declaration describing the conveyance from *Langdon* to the Plaintiff as an assignment of a chattel interest, whereas it appeared to be a conveyance of the fee by lease and release, in which no chattel interest was specifically mentioned.

When cause was to be shewn against this rule, the Court said the point might be discussed in the argument on the special verdict, and that the further argument on the demurrer might be postponed till after the argument on that verdict.

The special verdict was argued in *Michaelmas* term last by *Wilde* Serjt. for the Plaintiff, and *Taddy* for the Defendants; but the points debated are so fully discussed in the judgment of the Court, that it would be improper to present more than an outline of them here.

On the part of the Defendants it was contended, that the deed poll of *February* 1816 passed from *Bates* to *Langdon* the whole of *Bates*'s interest, leaving no reversion on *Meek*'s term, the *habendum* not having the effect of restraining the generality of the grant; or, if the deed granted less than the whole, it granted a concurrent lease commensurate with *Meek*'s term, leaving the twenty-one

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days' reversion on that term still in *Bates*; so that *Langdon* took no reversion by which he could distrain on *Meek*: distress being inseparable from reversion, and there being no reversion where there was no distress, (*Bro. Abr. Debt.* pl. 39., ——— v. *Cooper* (*a*), *Parmenter* v. *Webber* (*b*), *Preece* v. *Corrie* (*c*), the deed poll from *Bates* to *Langdon* suspended all rights of action incident to the reversion on *Meek's* term. *Bro. Abr. Extinguishment*, pl. 48.

Secondly, That the interest which passed from *Bates* to *Langdon* was at all events a chattel interest; and the conveyance from *Langdon* to the Plaintiff, being a conveyance of an interest in fee simple, did not operate to pass such chattel interest, and was misdescribed in the declaration as an assignment of a chattel interest.

Thirdly, That the Defendants, having never entered into possession, were not liable to the covenants in *Meek's* lease. That *Williams* v. *Bosanquet* (*d*), and the cases referred to there in support of the liability of the assignee, were distinguishable in this respect,—that in those cases the assignee took under a mortgage deed, and the mortgage had become absolute upon nonpayment of the money at the time stipulated; here the Defendants took under a mortgage from *Meek*, the mortgage was not to be absolute till nonpayment upon demand, and no demand had ever been made.

For the Plaintiff it was argued, that the effect of the *habendum* in the deed poll was to explain and limit the generality of the grant, not to defeat or contradict it; *Co. Lit.* 21. *Earl of Derby* v. *Taylor* (*e*), *Goodtitle* v. *Gibbs* (*g*), *Hob.* 170., 8 *Rep.* 154 *b.*, *Shep. Touchst.* 109., *Prest. on Conv.* 440. That *Bates's* interest passed *minus* the twenty-one days' reversion, after the expiration of

(*a*) 2 *Wils.* 375.
(*b*) 2 *B. M.* 656.
(*c*) 5 *Bingh.* 24.
(*d*) 1 *B. & B.* 238.
(*e*) 1 *East*, 502.
(*g*) 5 *B. & C.* 709.

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Meek's lease: that though the twenty-one days' reversion expectant on *Meek*'s lease did not pass by the deed poll, a reversionary interest passed commensurate with *Meek*'s lease: that, according to the definition given in *Plowden*, 160 *a.*, the word reversion has two intendments: one, the estate left in the lessor *during* the continuance of the particular estate demised; the other, the returning of the land after the expiration of the term; *Matures* v. *Westwood.* (*a*) That a lessor, therefore, had a reversionary interest during the term; and that *Bates* had granted the whole of his, *minus* the twenty-one days: that a lessor might grant *part* of his reversion: *Bac. Abr. Leases*, (N) 186., *Moore*, 93., *Shep. Touchst.* 245., *Hughes v. Robotham* (*b*), and the authorities collected in 3 *Prest. Conv.* 182. 210., *Watk. Princ. Conv.* 188. 191. 193. (*Coote*'s edit.), *Platt on Covenants*, 586.

That, therefore, the argument drawn from the supposed inability to distrain did not apply; and that the authorities on that head had originated in an incorrect citation from a passage in the Year Book 45 *Edw.* 3. fol. 8. pl. 10., which is followed by a *sed quære*, but is copied into *Broke's Abridgment* without the *quære*. *Bro. Abr. Debt*, pl. 54. *Extinguishment*, pl. 48.; and ——— v. *Cooper*, and *Preece* v. *Corrie*, refer to Broke only. That, consequently, there was no suspension of the right to sue on the covenants in *Meek*'s lease; and the twenty-one days outstanding in *Bates* prevented the deed poll from operating as a merger or extinguishment of the term, which, however, can only take place where the possession passes to the immediate lessor; *Bacon* v. *Wallack* (*c*), *Hodgkin* v. *Thornborow* (*d*), *Co. Lit.* 337. *b.*, *Gilb. Rents*, 183. That the deed poll could not operate as a surrender without

(*a*) *Cro. Eliz.* 599.
(*b*) *Cro. Eliz.* 302.
(*c*) 1 *Roll. Rep.* 388.
(*d*) *Pollexf.* 141. *Ventr.* 276.

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violating the intention of the parties, which was, that *Langdon* should have the rent reserved from *Meek*; and that the deed must be so construed as to accomplish, not frustrate their intention. *Vin. Abr. Surrender*, pl. 13., *Bro. Abr. Lease*, pl. 63., *Extinguishment*, 64.; *Rawlyns's* case (*a*), *Gilb. Rents*, 179., 3 *Prest. Conv.* 118. 109.

Secondly, The conveyance by lease and release was adequate to pass the chattel interest as well as the fee. It was clearly the intention of the parties that the Plaintiff should have the benefit of the covenants contained in *Meek's* lease. The language of the deed is sufficiently large to pass both interests; and it must be allowed to have that operation, if conducive to the intent of the parties. 2 *Wms. Saund.* 97 *b.*, and the authorities there cited; 7 *Vin. Abr. Deeds*, (F) pl. 2.; *Shep. Touchst.* 87. 85. 91.; 2 *Sand. Uses*, 79.; 4 *Cruise*, 263.; *Perk.* sect. 161.; 6 *East*, 104.; *Co. Lit.* 49.; *Goodtitle* v. *Baily.* (*b*) If the effect of the deed was to pass the chattel interest, it was properly described as an assignment in the declaration. *Moore* v. *The Earl of Plymouth* (*c*), *Gully* v. *Bishop of Exeter.* (*d*)

Thirdly, *Williams* v. *Bosanquet* is conclusive as to the Defendants' liability: they have accepted the assignment of the term; and that case was decided, not on the ground that the mortgage had become absolute, but on the acceptance of the assignment.

Cur. adv. vult.

The cause stood over till this term, when the judgment of the Court was delivered by

TINDAL C. J. This is an action of covenant, in which the Plaintiff declares for breaches of the covenants for payment of rent and keeping the premises in

(*a*) 4 *Rep.* 52.
(*b*) *Cowp.* 597.
(*c*) 3 *B. & A.* 68. 70.
(*d*) 4 *Bingh.* 290.

repair,

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repair, contained in an indenture of lease bearing date the 3d of *November* 1814, whereby one *David Bates* demised to one *James Meek* certain premises therein described, to hold from the 24th of *June* then last past, for the term of twenty-one years wanting twenty-one days.

The Plaintiff, in his declaration, makes title to himself as assignee of the reversion, first by averring that *Bates*, on the 12th of *February* 1816, by a certain deed poll indorsed on the counterpart of the indenture of demise to *Meek*, assigned to one *John Langdon*, his executors, &c., all his estate and interest, to hold to *Langdon* from thenceforth, for all such time or term therein as in the said counterpart of the said indenture is mentioned; and the declaration then alleges that *John Langdon*, on the 15th of *July* 1822, by indenture, assigned all his estate, right, title, and interest of and in the demised premises to the Plaintiff, to hold for the term of one whole year; and again, by indenture 16th of *July* 1822, assigned to the Plaintiff all his estate, right, title, &c., to hold to him, his executors, &c., for all such time or term of years as in the counterpart of the indenture of demise to *Meek* is mentioned, subject to a proviso for making void the same, on payment by *Langdon* to the Plaintiff of 700*l.* and interest. And the declaration then alleges, in the usual manner, that all *Meek*'s estate and interest came to and vested in the Defendants by assignment.

The pleas from the second to the eighth, both inclusive, state matters in bar, as it is contended, of the Plaintiff's right to maintain the action. The ninth plea denies the liability of the Defendants, by traversing that the estate and interest of *Meek* in the premises came to them by assignment. And the two remaining pleas merely deny the breaches of covenant alleged in the declaration.

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Now, the facts stated upon the pleadings, in bar of the Plaintiff's right of action, are in substance these: That *John Langdon*, being seised in his demesne as of fee in the premises in question, by indenture of the 5th of *July* 1814, demised them for twenty-one years to *Bates*, who entered and was possessed; that *Bates*, being so possessed of the premises, by indenture of the 3d of *November* 1815 (set out on oyer), demised them to *Meek* for the residue of his term therein, excepting the last twenty-one days; that, at the time of the execution of the deed poll of the 12th of *February* 1816 (also set out on oyer), *Langdon* still continued seized in fee of the reversion expectant on the determination of *Bates*'s lease; and that *Bates* did, by the deed poll last referred to, surrender up to *Langdon*, who accepted the same, the next immediate reversion expectant on the determination of *Meek*'s under-lease (to which the covenants in his lease were incident); whereby, as it is alleged upon the pleadings, the said immediate reversion became *merged* in *Langdon*'s fee.

In the fourth plea, the deed poll is stated according to its terms, and not according to the legal effect which the Defendants contend it bears; and it is alleged in that plea, as a legal inference, that all rights of action upon the covenants in the lease of 3d of *November* 1814 became thereby *suspended*.

To this plea there is a demurrer, and a joinder in such demurrer.

It is obvious, however, there can be no real or substantial distinction between the question raised on such demurrer, and the question upon the special verdict, so far as concerns the legal effect and operation of the deed poll of the 12th of *February* 1816.

The special verdict further finds and sets out in *hæc verba*, the deeds of the 15th and 16th of *July* 1822, under which the Plaintiff derives title in the declaration, and which

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which appear to have been a mortgage in fee by bargain and sale for a year, and release from *Langdon* to the Plaintiff; and also a certain assignment of the 19th of *October* 1816, from *Meek* to the Defendants, whereby, after reciting the lease from *Bates* to himself, he assigns to the Defendants all his estate and interest in the premises, subject to the rent and covenants, upon trust, that they should permit *Meek* to occupy and enjoy the premises until demand should be made of payment of the sum of 420*l.* and interest, upon payment of which sum the assignment should be void; and upon further trust, that if default should be made, the Defendants might enter, and sell and dispose of the term, and pay themselves the said sum of 420*l.* and all arrears of interest. The special verdict further finds, that no demand had been ever made for payment of the sum of 420*l.* and interest; that *Meek* has continued in possession from the time of executing the assignment; and that the Defendants have never entered, nor ever became actually possessed of the premises, or in any manner acted upon the said indenture of the 19th of *October* 1816, otherwise than by receiving that indenture, and the indenture of demise to *Meek*, into their possession, and retaining them ever since.

Upon the whole of this record three objections have been taken by the Defendants against the Plaintiff's right to maintain this action.

First, it is contended that the legal operation of the deed poll of the 12th of *February* 1816, was that of surrendering the immediate reversion expectant on the determination of *Meek*'s under-lease to *Langdon*, the next reversioner in fee, and thereby merging the smaller in the larger estate.

Secondly, that, at all events, if *Bates*'s chattel interest was not merged in the inheritance, it could not pass to

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Burton, the Plaintiff, by the deeds of lease and release of the 15th and 16th of *July* 1822, such deeds having their proper operation of conveying the fee.

Thirdly, that the Defendants are not such assignees of *Meek*'s interest as to become liable to an action upon the covenants in his lease.

The first question is this; What is the legal effect and operation of the deed poll? Looking at the relation of the parties, *Bates* the lessee, and *Langdon* the lessor, no doubt can be raised but that it was the object, and the sole object and intention of the grant, to assign to *Langdon* the improved rent arising from *Meek*'s under-lease. The improved rent was incident to the reversion of twenty-one days, which *Bates* had reserved to himself out of his entire term. And if that reversion passed by the grant to *Langdon*, it would necessarily defeat the very object of the parties, by merging it in the fee, and thereby depriving the grantee of any action upon the covenants. The parties, therefore, never could have intended to destroy this immediate reversion; and the question is, whether the deed poll is so worded, as to make it necessary for the Court to construe it as a surrender, and thereby defeat the sole intention of the parties. And we think this deed did not operate as a surrender of *Bates*'s reversion of twenty-one days to *Langdon*, the owner of the fee.

The deed poll is indorsed on the counterpart of the under-lease. It is in terms a grant of "the within written indenture, and the messuage or tenement, with the appurtenances, thereby granted, and all the estate, right, title, interest, &c. of *Bates*, to hold to the said *John Langdon*, his executors, administrators, or assigns, from thenceforth, *for all such time or term therein as within mentioned;*" that is, for the residue of the term of twenty-one years, *minus* twenty-one days, created by the under-

under-lease. There is nothing so necessarily repugnant in the *habendum* to the premises contained in this grant as to make the *habendum* void; but, taking the premises to contain the grant of the estate or interest which *Bates* then had, the *habendum* restrains the time or term for which such grant was to operate to the continuance of the lease to *Meek*. The *habendum* in this case restrains the generality of the premises, which is its proper office, according to *Hob. Rep.* 170, 171. Upon this construction of the deed poll, the intermediate period of twenty-one days reserved by *Bates* to himself remains untouched, and still subsisting in *Bates*. The grant of *Bates*'s interest to *Langdon* is a grant for a limited time only, viz. for a term co-extensive with *Meek*'s under-lease. At the moment of the determination of that under-lease, all the interest which *Langdon* takes under the deed poll ceases, and *Bates* becomes again entitled to enjoy the estate for the twenty-one days, the residue of the term originally granted to him.

If this be the proper construction of the deed poll, it is a necessary consequence that it cannot operate as a *surrender* of *Bates*'s reversion to *Langdon*; and, therefore, again, there is no *merger* of the term of *Bates* in the fee of *Langdon*. "A surrender is a yielding up of a particular estate for life or for years to him that hath the immediate estate in reversion or remainder, wherein the estate for life or years may drown." *Co. Lit.* 337 *b.* And, again, it is laid down in 2 *Roll. Abr.* 497. (L) 30., "If a lessee grants part of his estate to his lessor, whereby a reversion continues in himself, this is no surrender; as if a lessee for twenty years grants all his estate to the lessor, except one year, month, or day, at the end of the term, this is not any surrender, because the lessee hath a reversion."

We therefore think, without referring to other authorities, that this intermediate estate in *Bates*, carved out

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out of the term granted to him by *Langdon*, notwithstanding the deed-poll of 1816, still exists as a barrier between *Meek*'s term and the inheritance.

But it is objected, on the part of the Defendants, that as the rent and covenants in *Meek*'s under-lease are incident to *Bates*'s immediate reversion, if such reversion does not pass to *Langdon* by the deed poll, the right to sue upon the covenants in the under-lease can never be shewn to vest in the Plaintiff.

But to this we answer, that it is not necessary that *Langdon* should be the grantee of the *whole* of *Bates*'s reversion, in order to enable him to sue upon those covenants incident to such reversion; but that, if *Bates* grants such reversion to *Langdon* for a limited term only, it will enable *Langdon* so far to sustain the character of reversioner, as that he might either take a surrender from *Meek*, the under-lessee, or may maintain an action on the covenants incident to the reversion. For it is laid down by *Popham* C. J. and *Fenner* J., in the case of *Hughes* v. *Robotham* (*a*), and *Cro. Eliz.* 302., "That if lessee for twenty years make a lease for ten years, and then grants over the reversion for ten years only, viz. no longer than the lease for ten years was to continue, and such lessee for ten years had attorned, then the grantee of the reversion should have the *rent* and *services*, and the grantor the residue of the twenty years; and that the lessee for ten years might surrender to the grantee of the reversion for ten years, and he would thereby have possession so many years as were to come of his reversion; and if he had a lesser term in the reversion than the lessee himself had in the possession, it should go to the benefit of the first termor for twenty years, who was his grantor; for the term in possession is quite gone and drowned in the reversion, to the benefit

(*a*) *Poph. Rep.* 30.

of

of those who have the reversion thereupon, having regard to their estate in the reversion, and not otherwise."

Upon the whole, therefore, it appears to us, that the legal operation of the deed poll is that of a grant or demise by *Bates* to *Langdon* of his reversion expectant on *Meek*'s under-lease, for a term exactly co-extensive with such under-lease; and that such grant or demise has the effect, on the one hand, by preserving the intermediate estate for twenty-one days in *Bates*, so as to prevent a surrender or merger; and, on the other hand, to give to *Langdon*, whilst such grant continues, the right to sue on all the covenants, the same being incident to the immediate reversion.

But it has been contended, under this head, that the right to sue for the rent is *suspended*. It is obvious, however, from what has been already stated, there can be no suspension of *Meek*'s rent, if the reversion expectant upon the determination of the under-lease subsists in the grantee of *Bates*, distinct from the ultimate reversion in fee.

Suspension, which is a partial extinguishment, takes place only where the rent, or other profit *à prendre* issuing out of the land, comes to him who has possession of the same land for a time only.

The rent sought to be recovered in this action is that which is reserved under *Meek*'s under-lease: and if either *Bates* or *Langdon* had purchased the term granted by *Meek*'s under-lease, the rent in that case would have been suspended during the continuance of such under-lease; for in that case there would have been an union of the rent, and of the land itself, in the same person. So, if this action had been brought for the rent reserved under *Bates*'s lease, there might have been a question, whether his rent was not suspended until the term granted by him to *Langdon* had ceased; that is, until the

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the arrival of the last twenty-one days of his original term. But no such question can arise here.

We come therefore to the second objection raised by the Defendants, viz. the operation of the deeds of lease and release of the 15th and 16th of *July* 1822. The second objection is this,—that the chattel interest so granted by *Bates* to *Langdon* did not pass from *Langdon* to the Plaintiff by the lease and release of the 15th and 16th of *July* 1822.

The question is, whether this conveyance, which undoubtedly carried the fee from *Langdon* to the Plaintiff, and which was intended by the parties so to do, can by law have the additional operation of conveying a separate chattel interest in the same premises to the grantee.

That the intention of the parties, independent of the deed itself, was to convey to the Plaintiff all the interest, of whatever kind, which *Langdon* had in the premises, cannot be doubted. At the time of executing the deed of release, *Meek* was the tenant in possession: *Langdon* was possessed of the immediate reversion for the residue of a term of twenty-one years wanting twenty-one days, with remainder to *Bates* of twenty-one days, and reversion to *Langdon* in fee. Thus circumstanced, his object was to give a good and valid security to the Plaintiff for the repayment of 700*l.* and interest, by a mortgage in fee. But the only mode of making this security available for the next thirteen years was by granting his chattel interest to the mortgagee; for, without it, he would have no remedy for rent or repairs against the occupier of the premises.

That the deed of release, by proper words of recital and apt terms of grant, might have conveyed this chattel interest, as well as released the fee, is admitted by the Defendants. The only question, therefore, is, whether the words of the release are sufficiently large to carry into

into effect this, the object and intent of the parties. Now, after granting the messuage, which is described as being in the occupation of *Meek*, the deed of release contains the terms, "the reversion and reversions, yearly and other rents, issues, and profits, and all the estate, right, title, interest, use, trust, possession, property, claim, and demand whatsoever, of, in, and to the premises;" and under these words, we think the chattel reversion expectant on *Meek*'s term may well pass to *Burton*, and vest in him, whilst the fee passes to him and his heirs.

The general rule is, that deeds are to be construed, if possible, so as to effectuate the intent of the parties; (see the various instances in *Shepherd's Touchst.* 87., and *Willes's Rep.* 327.;) and no authority has been brought before us to shew, where a double purpose is intended, and the words are large enough, such double purpose may not be carried into effect.

And if the chattel interest of which *Langdon* was possessed, passed by grant or assignment to the Plaintiff by the deed of release, as we think it did, then no just exception could be taken to the mode in which it is set out in the declaration; for the statement in the declaration of the lease for a year is altogether nugatory, and may be rejected as surplusage, and the conveyance of the chattel interest will then stand upon the release alone, operating as a grant of this interest to the releasee.

Thirdly, The only remaining ground of objection made by the Defendants is, that they are not such assignees of *Meek*'s lease as to make them liable to the covenants therein contained. But upon this point the case of *Williams* v. *Bosanquet* (*a*) seems conclusive against the Defendants. The indenture of lease granted by

(*a*) 1 *B.* & *B.* 238.

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Bates to *Meek*, having been received by the Defendants in pursuance of the assignment of the 19th of *October* 1816, and also the deed of assignment itself, and having been retained by them ever since, are equivalent, according to that case, to taking possession. And if they have been legally possessed, the trusts of the deed, which are created for their own benefit, cannot affect their legal liability as assignees.

We therefore think there must be judgment for the Plaintiff, as well upon the special verdict as upon the demurrer to the fourth plea.

Judgment for Plaintiff.

Ex parte FRANKS, in the Matter of KEZIA FRANKS, a Bankrupt.

The wife of a convict sentenced to transportation, is liable to be made a bankrupt if she becomes a trader, although her husband remains in this country.

BY order of the Vice-Chancellor, the following case was submitted for the opinion of the Court: —

Joseph Franks, the husband of *Kezia Franks*, who for several years had carried on the trade or business of a china, glass, and earthenware dealer at *Portsea*, in the county of *Hants*, was, in 1821, convicted of feloniously having in his possession Bank of *England* notes, knowing them to have been forged, and was sentenced to be transported to parts beyond the seas for fourteen years. After sentence, *Joseph Franks* was removed to one of the hulks lying in the harbour of *Portsmouth* for the reception of convicts, where he has remained ever since, and where the said *Kezia Franks*, by the permission of the persons in charge of the convicts there, has been in the habit of visiting him, and holding occasional communication with him; and since his conviction has carried on the said trade or business of china, glass, and

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and earthenware dealer at *Portsea*, aforesaid, for the benefit and support of herself and family.

On the 25th of *July* 1827, a commission of bankrupt was awarded and issued against the said *Kezia Franks*, by the name and description of *Kezia Franks*, late of *Wickham Street*, *Portsea*, in the county of *Hants*, glass and china dealer, dealer and chapman, now a prisoner confined for debt in the King's Bench prison in the county of *Surrey*; and the said *Kezia Franks* was thereupon found and declared a bankrupt by the commissioners acting under the said commission.

The said *Kezia Franks*, in conducting such business as aforesaid since her husband's conviction, though she never gave out or pretended that she was an unmarried woman, was in the habit of accepting bills of exchange in her own name, and giving the same to persons who gave her credit; and the bills of parcels, receipts, and accounts of and for goods sold to her were in the name of Mrs. *Kezia Franks*; but it was generally known to the persons with whom she dealt, that she was married, and was continuing to carry on the business for the benefit of herself and family.

Henry Jacobs the younger was the petitioning creditor under the commission, and his debt was on two bills of exchange drawn by one *Lewis Jacobs*, for and on the behalf of one *Henry Jacobs*, upon and accepted by the said *Kezia Franks* in her own name, and which said two bills of exchange were afterwards, and before they became due, indorsed to the said *Henry Jacobs* the younger for a valuable consideration.

At the time of taking such bills, the said *Henry Jacobs* the younger did not know that the said *Joseph Franks*, the husband of *Kezia Franks*, was a convict on board the hulks, or alive; but he had notice thereof previous to the time when he petitioned for such commission.

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The question for the opinion of the Court was, whether, at the date and suing forth of the said commission of bankrupt against *Kezia Franks* on the 25th of *July* 1827, she was a trader, and, as such trader, liable to become bankrupt within the true intent and meaning of the act of parliament passed in the 6th year of the reign of the late King *George* IV., entituled "An act to amend the laws relating to bankrupts."

Jones Serjt. for the Plaintiff. *Kezia Franks* was competent to trade, in a condition to sue or be sued, and liable to be made bankrupt. She was in the same condition as the wife of one civilly dead. The abjuration, profession, or exile of the husband, has always created an exception to the general rule of the wife's disability. In *Sparrow* v. *Carruthers* (*a*), the wife's disability was held to be suspended by the transportation of the husband for a term of years. So in *Walford* v. *Duchesse de Pienne* (*b*), where the husband, a foreigner, went abroad, without returning for some years. *De Gaillon* v. *L'Aigle* (*c*) is to the same effect; and *Buller* J. said, "There is another set of cases of a very different nature from those which have been relied on by the Defendant, but which are more applicable to this case. The first of these is Lady *Belknap*'s case (2 *H.* 4. 7. a). Now, let us see if any sound distinction between that case and this can be maintained. The husband there was banished; but it was not stated whether he was banished for one year, for five years, or for life: it was held sufficient, that he was in banishment at the time when Lady *Belknap*'s contract was made: and I can see but one principle on which the case could have been decided, viz. that the

(*a*) Cited in 1 *T. R.* 7. 2 *W. Bl.* 1197.

(*b*) 2 *Esp.* 554.

(*c*) 1 *B. & P.* 357.

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rights known to exist in law between husband and wife were not interfered with by allowing the wife to be taken in execution; as the husband was banished (though it be not stated whether for life or not), the matrimonial rights during his banishment were, at least, suspended." *Heath* J. said, "The cases of banishment and transportation of the husband are directly in point. Besides, it is for the benefit of the feme covert that she should be liable to an action in such a case as this, otherwise she could obtain no credit, and would have no means of gaining her livelihood." In *Carroll* v. *Blencowe* (*a*), the wife of a transported felon was held competent to sue, although the term of the husband's transportation had expired; and in *Lewis* v. *Lee* (*b*) the point is admitted by the Court. *Jewson* v. *Read* (*c*) is also an authority to the same effect. Where a feme covert may sue and be sued, she may also trade: and the trading in this instance was for her benefit, as it enabled her to support her family. If she be competent to trade, she is subject to the same law as other traders.

It is true, that Lord *Coke* says (*Co. Lit.* 133.) that relegation for a certain term is not civil death; but Mr. *Hargrave*, in a note, observes that the effect is the same for a time.

Spankie Serjt. contrà. Although the abjuration of the husband may effect an exception to the general rule touching the disability of the wife, yet that can only be where it is resorted to as a commutation for the punishment of death. Exile and profession are now out of the question; but even in former days a man *non potuit exuere uxorem. Sanchez de Sancto Matrimonii, cap.* 9. *de Debito Conjugali.* The whole, therefore, turns

(*a*) 4 *Esp.* 27.
(*b*) 3 *B.* & *C.* 291.
(*c*) *Lofft.* 134.

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upon the effect of abjuration. Lord *Coke* (*Co. Lit.* 133.) mentions three cases of that kind; *Belknap*'s case (*a*), *Weyland*'s case, and *Maltravers*'s case. With *Weyland*'s case, which is the foundation of the whole, he has taken great liberties. It appears from *Rot. Parl.* 66. to have been a case in which the wife claimed her own land. In *Belknap*'s case (*b*), she also sued for her own land; and in *Maltravers*'s case (*c*) the only judgment was, that she should answer the writ. So that these cases only shew, that if the husband abjured, the wife should not be deprived of land which he held in her own right. That was a law clearly for her benefit, and exposing her to no liability. Transportation, however, has no resemblance to abjuration; since it may be inflicted for offences not capital, and for periods shorter than life. The consequences of abjuration are enumerated in *Hawk. P. C.* b. 2. c. 9.; *Staundfd. Prerog.* 117.; 3 *Inst.* 115. The consequences of transportation are only those enacted by statute. When a convict returns, he is restored to all his rights; the *vinculum matrimonii* remains unbroken, and what the wife has acquired during his absence is his property. By 5 *G.* 4. *c.* 84. *s.* 26., convicts may sue upon obtaining remission of their sentence; and their capacity to acquire property is acknowledged by 19 *G.* 3. *c.* 74. A *status*, therefore, in which there is *spes redeundi*, and a capacity of acquiring property, can never be assimilated to abjuration: and transportation is to the king's dominions, not to foreign parts; there is no renouncing the realm. Transportation has no analogy to civil death. The property of an attainted or convicted felon goes to the

(*a*) "Whereof," says Lord *Coke*, "one said

Ecce modo mirum, quod fœmina fert breve regis;
Non nominando virum conjunctum robore legis."

(*b*) 2 *H.* 4. fol. 7. pl. 6. (*c*) 10 *Ed.* 3. fol. 53. pl. 37.

crown;

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crown; *Bullock* v. *Dodds.* (*a*) If so, property acquired by his wife also: for the legal incidents of marriage are not destroyed by a transportation for a limited term. *Sparrow* v. *Carruthers*, and *Walford* v. *de Pienne*, were decided at a time when the Courts were disposed to extend the separate character of the wife, and both cases proceeded on a misapplication of the doctrine of abjuration. In the *Duchess of Mazarin*'s case (*b*), and *De Gaillon* v. *L'Aigle*, the husband was an alien enemy. In *Marsh* v. *Hutchinson* (*c*), where an *Englishman* employed in the service of the *British* government, residing in a foreign country, and having lands there, upon the cessation of his employment in consequence of war between the two countries, sent his wife and family to this country, but continued to reside abroad himself, it was held, that the wife, not having represented herself as a *feme sole*, was not liable to be sued as such. The marriage is not dissolved by transportation; the husband might sue for criminal conversation in his absence; and if his wife were made a bankrupt, and were uncertificated, he would, on his return, be liable to her debts. [*Tindal* C. J. Would not that inconvenience arise where a married woman is permitted to trade, as in *London?*] In *London* the party marries, knowing his liability; but the felon would be taken by surprise on his return. And as to the argument of convenience, the wife may do many honest and lawful things for her support without trading. The extinction of the husband's rights may be understood, but the suspension of them would lead to much confusion.

Jones. There is no difference in principle, whether the suit be for land or for other property. And the husband's rights may be suspended as well as ex-

(*a*) 2 *B.* & *A.* 258.
(*b*) 1 *Salk.* 116. 2 *Salk.* 646.
(*c*) 2 *B.* & *P.* 226.

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tinguished; for in all the cases referred to, the transportation was for a term of years. In *Lean* v. *Schutz*(*a*) the Court said, "The wife may acquire a separate character by the civil death of her husband, as by exile or the like." The same position may be found in *Hatchett* v. *Baddeley*(*b*); and in *La Vie* v. *Philips* (*c*) it was decided that a wife, being a sole trader in *London*, may be made a bankrupt.

The following certificate was afterwards sent: —

We have heard this case argued by counsel, and considered the same; and are of opinion, that, at the date and suing forth of the commission of bankrupt against *Kezia Franks*, to wit, on the said 25th day of *July* 1827, the said *Kezia Franks* was a trader, and, as such, liable to become bankrupt within the true intent and meaning of the act of parliament passed in the sixth year of the reign of his late Majesty King *George* the Fourth, intituled "An act to amend the laws relating to bankrupts."

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
J. B. BOSANQUET.

(*a*) 2 *W. Bl.* 1198 (*b*) 2 *W. Bl.* 1079. (*c*) 1 *W. Bl.* 570.

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SADLER and LARGE *v.* SAMUEL and CHARLES CLEAVER.

June 11.

DEBT to recover 1083*l.*, the balance due upon an award made in *March* 1824.

The Defendants, after pleading jointly many special pleas, on the cause coming on for trial the 2d of *March* 1829, pleaded *puis darrein continuance*, a joint plea of release executed to them by Plaintiff *Large*. Whereupon,

The Plaintiff *Sadler* obtained an injunction to restrain the Defendants from using such release in support of the plea, and the cause went down to trial again on the 2d of *June* 1830, when

Samuel Cleaver pleaded separately, *puis darrein continuance*, another plea of release executed to *Samuel* by Plaintiff *Large*; and *Charles Cleaver* pleaded separately, *puis darrein continuance*, a plea of his (*C. C.*'s) bankruptcy, and certificate on a commission dated *July* 30th, 1829.

To this plea of bankruptcy a demurrer was put in, in which judgment was obtained for the Plaintiff in *Hilary* term 1831; and the Plaintiff *Sadler* obtained another injunction, prohibiting the Defendants from availing themselves of the last-mentioned release in bar of this action. Whereupon

Notice of trial was given for the sittings after *Hilary* term 1831: but on the 25th of *January* 1831, the Defendants pleaded again, *puis darrein continuance*, separate pleas of the bankruptcy of the Plaintiff *Large* in *November* 1830.

In *Easter* term 1831 these last pleas were set aside upon application to the Court; but in the same term

Under 6 *G.* 4. *c.* 16. *s.* 120, which authorizes the discharge of a certificated bankrupt taken in execution for a debt provable under his commission, the Court has incidentally the power of staying, before judgment, proceedings against such a bankrupt for such a debt.

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Jones Serjt. moved to stay all further proceedings against the Defendants on an affidavit that *Samuel Cleaver* had become bankrupt in *August* 1830, and had obtained his certificate; and that *Charles Cleaver* had become bankrupt in *July* 1829, and had obtained his certificate as stated in his plea.

The delay in the proceedings was alleged to have been occasioned by a change of attornies.

Humphries v. *Knight* (*a*), *Davis* v. *Shapley* (*b*), *Todd* v. *Maxfield* (*c*), and *Read* v. *Sowerby* (*d*) were relied on in support of the application.

Taddy Serjt., who shewed cause on the first day of this term, read affidavits which alleged that the Defendants had been bankrupts in 1813; that no dividend had been paid, nor were there any assets, upon their bankruptcy in 1829 and 1830; and that it was inferred those bankruptcies were fraudulent, and concerted with a view to defeat this action, inasmuch as the attornies who had been employed in succession to defend the action were the attornies who had conducted the commissions of bankrupt, and the Defendants had been repeatedly heard to say that if they were pressed for the payment of the Plaintiff's demand they must go into the *Gazette* as bankrupts. Under these circumstances, he contended, first, that the Court would not, in the exercise of a discretionary power, assist the Defendants:

They had thwarted the Plaintiff's recovery of a just debt by a most vexatious course of pleading: it was plain, from the circumstance of the Court of Chancery granting injunctions, that the alleged releases were fraudulent; and it was impossible not to infer that the commissions of bankrupt, on which the Defendants

(*a*) 6 *Bingh.* 569. 572.
(*b*) 1 *B. & Adol.* 54.
(*c*) 3 *B. & C.* 222.
(*d*) 3 *M. & S.* 78.

grounded

grounded the present application, were concerted and fraudulent also. The Plaintiffs, therefore, ought not to be deprived of the opportunity of replying that fraud either to the Defendants' last pleas, or on an *auditâ querelâ*, *Thornton* v. *Dallas* (*a*), which the Defendants might sue out if they could shew any ground hereafter why the Plaintiffs should not enforce execution against them (*b*): but,

Secondly, the Court had no jurisdiction to interfere in the present stage of the proceedings; for the statute 6 *G.* 4. *c.* 16. *s.* 120. only authorized the discharge of a certificated bankrupt when taken in execution after judgment, not the staying proceedings before judgment. In *Humphries* v. *Knight*, and *Davis* v. *Shapley*, the application was after execution, and *Todd* v. *Maxfield* merely decided that the Court will order an *exoneretur* to be entered on the bail-piece in all cases where the defendant is entitled to be discharged out of custody.

Jones. There is no sufficient ground for assuming that the Defendants' bankruptcies and certificates are fraudulent. And the summary interference of the Court before judgment against the Defendants is within the spirit and meaning of the 6 *G.* 4. *c.* 16., for if the Defendants are entitled to their discharge upon the issuing of execution, the expense of proceeding to judgment would be incurred to no purpose.

The Court took time to look into the affidavits; and now

TINDAL C. J. said, This was an application to stay proceedings on the ground that the Defendants had become bankrupt, and had obtained their certificates.

(*a*) *Dougl.* 46.
(*b*) *Sowley* v. *Jones*, 2 *Black-stone*, 725. *Martin* v. *O'Hara*, *Coup.* 823.

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Properly speaking, the application comes at an earlier stage of the proceedings than that in which the statute calls on the Court to interfere, the 120th section only specifying the case of a bankrupt taken in execution. But as the proceedings must lead to that point if the parties go on, the Court think that the clause is not in that respect imperative, but that the period of the discharge must be in some degree discretionary. *Looking* at the record in this case, it appears that much vexatious delay has been interposed to the Plaintiffs' recovery since the 2d of *March* 1829; and as he has thereby been put to unnecessary expense, we make the rule absolute on the Defendants paying the costs incurred subsequently to that day.

Rule absolute accordingly.

June 13.

SPOONER *v.* DANKS.

Defendant being arrested for 500*l.*, set up her coverture as a defence, and Plaintiff recovered only 38*l.* for money advanced after the death of her husband.

Upon an application for costs under 43 *G.* 3. *c.* 46., the Plaintiff having deposed that he was ignorant of the coverture, Held, that to obtain the costs, Defendant was bound to shew that the Plaintiff knew of the coverture.

E. LAWES Serjt. had obtained a rule to shew cause why the Plaintiff should not pay the costs of *this* action under 43 *G.* 3. *c.* 46., the Defendant having been arrested for a sum of 500*l.*, and the Plaintiff having recovered only 38*l.*

Bompas Serjt. shewed cause, on an affidavit of the Plaintiff, which stated that the Defendant had become indebted to the Plaintiff at various times in divers large sums of money, to recover which sums the Plaintiff was compelled to bring an action, when Defendant set up her coverture as a defence. Of the fact

of

of her coverture, the Plaintiff had, until then, been ignorant; but being able to prove advances made to the Defendant since her husband's death, he proceeded to trial, and obtained a verdict for the amount of such advances.

E. Lawes, after disputing that any credit could be attached to the Plaintiff's affidavit, contended that, whether or not the Plaintiff was cognizant of the marriage, would not affect the question. It was impossible for the Plaintiff to recover any advances made to the wife pending her coverture; and his ignorance of that fact could not justify the arrest, or deprive the Defendant of the benefit of the statute. The disproportion between the sum sworn to, and that recovered, made it impossible to suppose that the Plaintiff could have had any probable cause for the arrest.

TINDAL C. J. Adverting to the words of the statute, we think that it was intended to throw the burden of proof upon the Defendant. The Court must construe this statute in accordance with the rule adopted in the case of an action for an arrest without reasonable or probable cause. Then the question here is, whether or not the Defendant has shewn that in what the Plaintiff has done, he has acted without reasonable or probable cause. We think that the Defendant should not only have shewn that she was a married woman, but that the Plaintiff knew her to be so; on her part, however, there is no affidavit to that effect. It is clear, therefore, according to this construction of the statute, that the Defendant has not complied with its provisions, nor entitled herself to its protection. The rule must therefore be discharged.

The rest of the Court concurring, the rule was

Discharged.

MEMORANDUM.

In *Easter* term last *William Walton*, Esquire, was appointed one of His Majesty's counsel; during this term, *William Fuller Boteler*, and *John Augustus Francis Simpkinson*, Esquires; and early in *Trinity* Vacation the following gentlemen also,—*Henry William Tancred*, *Francis Ludlow Holt*, *Phillip Williams*, and *Charles Butler*, Esquires.

REGULA GENERALIS.

Whereas declarations in actions upon bills of exchange, promissory notes, and the counts, usually called the common counts, occasion unnecessary expense to parties by reason of their length, and the same may be drawn in a more concise form; now, for the prevention of such expense, It is ordered, That if any declaration in *assumpsit* hereafter filed or delivered, and to which the Plaintiff shall not be entitled to a plea as of this term, being for any of the demands mentioned in the schedule of forms and directions annexed to this order, or demands of a like nature, shall exceed in length such of the said forms set forth or directed in the said schedule, as may be applicable to the case; or, if any declaration in debt to be so filed or delivered for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the Plaintiff if he succeeds in the cause; and such costs of the excess as have been incurred by the Defendant, shall be taxed and allowed

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allowed to the Defendant, and be deducted from the costs allowed to the Plaintiff. AND IT IS FURTHER ORDERED, That on the taxation of costs, as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and in case any costs shall be payable by the Plaintiff to the Defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

TENTERDEN.	J. VAUGHAN.
N. C. TINDAL.	J. PARKE.
LYNDHURST.	W. BOLLAND.
J. BAYLEY.	J. B. BOSANQUET.
J. A. PARK.	W. E. TAUNTON.
J. LITTLEDALE.	E. H. ALDERSON.
S. GASELEE.	J. PATTESON.

Schedule of Forms and Directions.

Count on a promissory note against the maker, by payee or indorsee, as the case may be.

For that whereas the Defendant on the day of , in the year of our Lord , at *London* [*or* in the county of], made his promissory note in writing, and delivered the same to the Plaintiff, and thereby promised to pay to the Plaintiff £ { days / weeks / months } after the date thereof [*or as the fact may be*], which period has now elapsed, [*or if the note be payable to* A. B.] and then and there delivered the same to *A. B.*, and thereby promised to pay to the said *A. B.* or order £ { days / weeks / months } after the date thereof [*or as the fact may be*], which period has now elapsed, and the said *A. B.* then and there indorsed the same

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same to the Plaintiff, whereof the Defendant then and there had notice, and then and there, in consideration of the premises, promised to pay the amount of the said note to the Plaintiff, according to the tenor and effect thereof.

Count on a promissory note against payee by an indorsee.

Whereas one *C. D.*, on the day of , in the year of our Lord , at *London* [*or*, in the county of], made his promissory note in writing, and thereby promised to pay the Defendant, or order, £ { days / weeks / months } after the date thereof [*or as the fact may be*], which period has now elapsed, and the Defendant then and there indorsed the same to the Plaintiff [*or*, and the Defendant then and there indorsed the same to *X. Y.*, and the said *X. Y.* then and there indorsed the same to the Plaintiff]; and the said *C. D.* did not pay the amount thereof, although the same was there presented to him on the day when it became due, of all which the Defendant then and there had due notice.

Count on a promissory note against indorser by indorsee.

Whereas one *C. D.*, on , at *London* [*or*, in the county of], made his promissory note in writing, and thereby promised to pay to *X. Y.*, or order, £ { days / weeks / months } after the date thereof [*or as the fact may be*], which period has now elapsed, and then and there delivered the said note to the said *X. Y.*, and the said *X. Y.* then and there indorsed the same to the Defendant, and the Defendant then and there indorsed the same to the Plaintiff [*or*, and the Defendant then and there indorsed the same to *Q. R.*, and the said *Q. R.* then and there indorsed the same to the Plaintiff]; and the said *C. D.* did not pay the amount thereof,

thereof, although the same was there presented to him on the day when it became due, of all which the Defendant then and there had due notice. 1831.

Count on an inland bill of exchange against the acceptor by the drawer, being also payee.

Whereas the Plaintiff on at *London* [*or* in the county of], made his bill of exchange in writing, and directed the same to the Defendant, and thereby required the Defendant to pay to the Plaintiff £ { days / weeks / months } after the { date / sight } thereof, which period has now elapsed; and the Defendant then and there accepted the said bill, and promised the Plaintiff to pay the same according to the tenor and effect thereof and of his said acceptance thereof, but did not pay the same when due.

Count on an inland bill of exchange against the acceptor by the drawer, not being the payee.

Whereas the Plaintiff, on at *London* [*or* in the county of], made his bill of exchange in writing, and directed the same to the Defendant, and thereby required the Defendant to pay to *O. P.*, or order, £ { days / weeks / months } after the { date / sight } thereof, which period has now elapsed, and then and there delivered the same to the said *O. P.*; and the said Defendant then and there accepted the same, and promised the Plaintiff to pay the same according to the tenor and effect thereof and of his acceptance thereof, yet he did not pay the amount hereof, although the said bill was there presented to him on the day when it became due; and thereupon the same was then and there returned to the Plaintiff; of all which the Defendant then and there had notice.

Count on an inland bill of exchange

Whereas one *E. F.*, on at *London* [*or* in the county of], made his bill of exchange in writing, and

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against the acceptor by indorsee.

and directed the same to the Defendant, and thereby required the Defendant to pay to the said *E. F.* [*or*, to *H. G.*], or order, £ { days / weeks / months } after { sight / date } thereof, which period is now elapsed, and the Defendant then and there accepted the said bill, and the said *E. F.* [*or*, the said *H. G.*], then and there indorsed the same to the Plaintiff [*or*, and the said *E. F. or*, the said *H. G.* then and there indorsed the same to *K. J.* and the said *K. J.* then and there indorsed the same to the Plaintiff], of all which the Defendant then and there had due notice, and then and there promised the Plaintiff to pay the amount thereof, according to the tenor and effect thereof and of his acceptance thereof.

Count on an inland bill of exchange against the acceptor by the payee.

Whereas one *E. F.*, on at *London* [*or*, in the county of], made his bill of exchange in writing, and directed the same to the Defendant, and thereby required the Defendant to pay to the Plaintiff £ { days / weeks / months } after the { sight / date } thereof, which period has now elapsed; and the Defendant then and there accepted the same, and promised the Plaintiff to pay the same according to the tenor and effect thereof and of his acceptance thereof.

Count on an inland bill of exchange against the drawer by payee on non-acceptance.

Whereas the Defendant, on at *London* [*or*, in the county of], made his bill of exchange in writing, and directed the same to *J. K.*, and thereby required the said *J. K.* to pay to the Plaintiff £ { days / weeks / months } after the { sight / date } thereof, and then and there delivered the same to the said Plaintiff, and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to

to accept the same; of all which the Defendant then and there had due notice. 1831.

Whereas the Defendant, on at *London* [*or*, in the county of], made his bill of exchange in writing, and directed the same to *J. K.*, and thereby required the said *J. K.* to pay to the order of the said Defendant £ { days / weeks / months } after the { sight / date } thereof, and the said Defendant then and there indorsed the same to the Plaintiff [*or*, and the said Defendant then and there indorsed the same to *L. M.*, and the said *L. M.* then and there indorsed the same to the Plaintiff], and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to accept the same; of all which the Defendant then and there had due notice.

Count on an inland bill of exchange against drawer by indorsee on non-acceptance.

And whereas one *N. O.*, on at *London* [*or*, in the county of], made his bill of exchange in writing, and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to his order £ { days / weeks / months } after the { date / sight } thereof, and the said *N. O.* then and there indorsed the said bill to the Defendant [*or*, to *R. S.*, and the said *R. S.* then and there indorsed the same to the Defendant], and the Defendant then and there indorsed the same to the Plaintiff, and the same was then and there presented to the said *P. Q.* for acceptance, and the said *P. Q.* then and there refused to accept the same; of all which the Defendant then and there had due notice.

Count on an inland bill of exchange against indorser by indorsee on non-acceptance.

Whereas one *N. O.* on at *London* [*or*, in the county of], made his bill of exchange in writing,

Count on an inland bill of exchange

1831.

against payee by indorsee on non-acceptance.

writing, and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to the Defendant or order £ { days / weeks / months } after the { sight / date } thereof, and then and there delivered the same to the Defendant, and the Defendant then and there indorsed the said *bill* to the Plaintiff [*or*, to *R. S.* and the said *R. S.* then and there indorsed the same to the Plaintiff,] and the same was then and there presented to the said *P. Q.* for acceptance, and the said *P. Q.* then and there refused to accept the same, of all which the Defendant then and there had due notice.

Direction for declarations on bills where action brought after time of payment expired.

If the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment the following words; viz. *which period has now elapsed;* and instead of averring that the bill was presented to the drawee for *acceptance*, and that he refused to *accept* the same, to allege that the drawee [naming him] *did not pay the said bill, although the same was there presented to him on the day when it became due.*

1st, On bills payable after date.

2dly, On bills payable after sight.

And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight, it will be necessary to insert after the words denoting the time appointed for payment the following words; viz. *and the said drawee* [naming him] *then and there saw and accepted the same, and the said period has now elapsed;* and instead of alleging that the bill was presented for acceptance and refused, to allege that the drawee [naming him] *did not pay the said*

said bill, although the same was presented to him on the day when it became due. 1831.

If a *note* or *bill* be payable *at sight*, the form of the declaration must be varied so as to suit the case, which may be easily done. Directions for declarations on bills or notes payable at sight.

Declarations on foreign bills may be drawn according to the principle of these forms, with the necessary variations. On foreign bills.

Common Counts.

Whereas the Defendant on at *London* [*or*, in the county of], was indebted to the Plaintiff in £ for the price and value of goods, then and there {bargained / sold} and {sold / delivered} by the Plaintiff to the Defendant at his request:

And in £ for the price and value of work then and there done, and materials for the same provided by the Plaintiff for the Defendant at his request:

And in £ for money then and there lent by the Plaintiff to the Defendant at his request:

And in £ for money then and there paid by the Plaintiff for the use of the Defendant at his request:

And in £ for money then and there received by the Defendant for the use of the Plaintiff:

And in £ for money found to be due from the Defendant to the Plaintiff on an account then and there stated between them.

And whereas the Defendant afterwards, on, &c. in consideration of the premises respectively, then and there promised to pay the said several monies respec- General conclusion.

1831.

tively to the Plaintiff on request, yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof, to the Plaintiff's damage of £ and thereupon he brings suit, &c.

Direction as to the general conclusion.

If the declaration contains one or more counts against the maker of a note or acceptor of a bill of exchange, it will be proper to place them first in the declaration, and then in the general conclusion to say, promised to pay the said *last-mentioned several monies respectively.*

REGULÆ GENERALES.

IT IS ORDERED, That a Defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of *Sunday*. That if the Plaintiff is desirous of time to enquire after the bail, and shall give one day's notice thereof as aforesaid to the Defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then (unless the Court or a Judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time.

AND IT IS FURTHER ORDERED, That every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder.

AND

1831.

AND IT IS FURTHER ORDERED, That if the notice of bail shall be accompanied by an affidavit of each of the bail according to the form hereto subjoined, and if the Plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the Defendants shall pay the costs of opposition, unless the Court or a Judge thereof shall otherwise order.

AND IT IS FURTHER ORDERED, That if the Plaintiff shall not give one day's notice of exception to the bail, by whom such affidavit shall have been made, the recognizance of such bail may be taken out of Court without other justification than such affidavit.

AND IT IS FURTHER ORDERED, That the bail, of whom notice shall be given, shall not be changed without leave of the Court or a Judge.

AND IT IS FURTHER ORDERED, That with every declaration, if delivered, or with the notice of declaration, if filed, containing counts in *indebitatus assumpsit*, or debt on simple contract, the Plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. And to secure the delivery of particulars in all such cases, IT IS FURTHER ORDERED, that if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the Plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And that a copy of the particulars of the demand, and also particulars (if any) of the Defendant's set-off, shall be

1831. annexed by the Plaintiff's attorney to every record at the time it is entered with the Judge's marshal.

AND IT IS FURTHER ORDERED, That upon every declaration, delivered or filed, on or before the last day of any term, the Defendant, whether in or out of any prison, shall be compellable to plead as of such term without being entitled to any imparlance.

AND IT IS FURTHER ORDERED, That no judgment of *non pros* shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made, in writing, upon the Plaintiff, his attorney or agent, as the case may be.

AND IT IS FURTHER ORDERED, That hereafter it shall not be necessary to issue more than two summonses for attendance before a Judge upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shewn to the contrary.

AND IT IS FURTHER ORDERED, That no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process, in the case of process which is not bailable, or until the expiration of six days from the time of the arrest, in case of bailable process; and such six days shall be reckoned inclusive of the day of such service or arrest.

AND IT IS FURTHER ORDERED, That declarations in ejectment may be served before the first day of any term, and thereupon the Plaintiff shall be entitled to judgment against the casual ejector in like manner as upon declarations served before the essoin or first general return-day.

AND IT IS FURTHER ORDERED, That before taxation of costs, one day's notice shall be given to the opposite party.

AND IT IS FURTHER ORDERED, That no rule to shew cause,

cause, or motion shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up upon a Judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances. Provided, that no summons or order shall be necessary in the following cases, that is to say, where the plea of *non assumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the Defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy, and coverture, or any two or more of such pleas shall be pleaded together; but in all such cases, a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof. 1831.

AND IT IS FURTHER ORDERED, That these rules shall take effect on the first day of next *Michaelmas* term, except the rule as to the service of declarations in ejectment, which shall take effect from the 25th day of *October* next.

TENTERDEN.	J. VAUGHAN.
N. C. TINDAL.	J. PARKE.
LYNDHURST.	W. BOLLAND.
J. BAYLEY.	J. B. BOSANQUET.
J. A. PARK.	W. E. TAUNTON.
J. LITTLEDALE.	E. H. ALDERSON.
S. GASELEE.	J. PATTESON.

Form of Affidavit.

IN THE

BETWEEN, &c.

A. B., one of the bail for the above-named Defendant, maketh oath and saith, that he is a housekeeper

1831. [*or*, freeholder, *as the case may be*], residing at [*describing particularly the street or place, and number, if any*], that he is possessed of property to the amount of £ [*the amount required by the practice of the Courts*] over and above all his just debts; [*if bail in any other action, add* " and every other sum for which he is now bail;"] that he is not bail for any Defendant except in this action, [*or, if bail in any other action or actions, add* " except for *C. D.* at the suit of *E. F.* in the Court of in the sum of £ ; for *G. H.*, at the suit of *I. K.*, in the Court of in the sum of £ ;" *specifying the several actions with the Courts in which they are brought, and the sums in which the deponent is bail;*] that the deponent's property, to the amount of the said sum of £ [*and if bail in any other action or actions, add* " of all other sums for which he is now bail as aforesaid,"] consists of [*here specify the nature and value of the property, in respect of which the bail proposes to justify, as follows:* — Stock in trade, in his business of , carried on by him at , of the value of £ , of good book debts owing to him to the amount of £ , of furniture in his house at , of the value of £ , of a freehold or leasehold farm, of the value of £ ; situate at , occupied by , or of a dwelling-house of the value of £ situate at , occupied by , *or, of other property, particularizing each description of property, with the value thereof;*] and that the deponent hath for the last six months resided at [*describing the place or places of such residence*].

Sworn, &c.

END OF TRINITY TERM.

AN

INDEX

TO THE

PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

per cent. interest on his private account for six months, from *March* 1st, 1827, and 5 per cent. afterwards; that the partnership accounts should be made up, and the Defendant's share of the proceeds go towards the liquidation of his separate debt; that the Plaintiff should receive sums due to the firm, discharge debts, and apply the balance towards discharging the Defendant's separate debt; that the partnership might be dissolved any 1st of *January*, on six months' notice being given, but that, in consequence of the Plaintiff's concessions as to interest, it was expected there should be no dissolution on 1st of *January* next ensuing:

Held, that this agreement did not suspend the Plaintiff's right to sue the Defendant for the separate debt due from him to the Plaintiff. *Simpson* v. *Rackham.* *Page* 617

AGREEMENT IN RESTRAINT OF TRADE.

An agreement that Defendant, a moderately skilful dentist, would abstain from practising over a district 200 miles in diameter, in consideration of receiving instructions from the Plaintiff, and a salary determinable at three months' notice, Held, unreasonable and void. *Horner* v. *Graves.* 735

AMENDMENT.

See PRACTICE, 13. FINE AND RECOVERY, 2.

ARREST.

See PRACTICE, 5. 8.

ASSIGNEE.

See BANKRUPT, 2.

ASSUMPSIT.

1. Defendant retained Plaintiff, a surveyor, to negotiate the sale of her reversionary interest in certain premises, and agreed to give him 2 per cent. on the sum *obtained.* The premises were sold to the commissioners under the *Charing Cross* Improvement Acts, and a jury awarded the Defendant 4000*l.* The premises were charged with an annuity of 80*l.* a year, of which the Defendant had not apprised the Plaintiff, and the Defendant declining to induce the annuitant to be a party to the conveyance to the commissioners, they paid the money into the Bank, where it might be obtained by the parties entitled to it, upon application to the Court of Exchequer:

The money still being in the Bank, held, that the Plaintiff could not recover the 2 per cent. commission on the sale. *Bull* v. *Price.* *Page* 237

2. Plaintiff engaged to let Defendant land on building leases, and to lend him 4000*l.* to assist him in the erection of twenty houses; the money to be repaid by *June* 1828. Defendant agreed to build the houses, to convey them as security

security for the loan, and repay the money: when six houses were built, and 1168*l.* had been advanced, Plaintiff requested Defendant not to go on with the other fourteen houses: Defendant desisted: Held, that after *June* 1828 the Plaintiff might recover the 1168*l.* on a count for money lent; and that it was not necessary to sue on the agreement. *James, gent. one, &c.* v. *Cotton.* *Page* 266

ATTESTATION.

See WILL, 1.

ATTORNEY.

See PRACTICE, 3.

1. Charges by an attorney for attending and advising a party in a suit, are taxable charges; and though they be the only taxable charges in a bill of many items, the attorney cannot recover any part of his demand without leaving his bill with Defendant a month before action, according to 2 *G.* 2. *c.* 23. *Smith* v. *Taylor.* 259
2. The Defendant, an attorney, was sued for negligence in allowing judgment to go by default in an action which the Plaintiff had retained him to defend: the negligence being proved, Held, it was for the attorney to defend himself by shewing, if he could, that the Plaintiff had no defence in that action, and not for the Plaintiff to begin by shewing he had a good defence, and so had been damaged by the judgment by default. *Godefroy* v. *Jay.* *Page* 413
3. An attorney cannot charge for work which is useless towards accomplishing the object his client has in view, although performed through inadvertence or inexperience, and not with the design of imposing on the client. *Hill* v. *Featherstonhaugh.* 569

AVOWRY.

See PLEADING, 2.

AWARD.

See PRACTICE, 7.

BAIL IN ERROR.

The Plaintiff below having given bail in error in an action on a bond, the Court ordered the recognizance to be cancelled, even after judgment affirmed in the Court below, and a new writ of error brought to the House of Lords, and though the Plaintiff was a foreigner and insolvent. *Duvergier* v. *Fellows.* 463

BANKRUPT.

See EVIDENCE, 11. SURETY. EXECUTION. POWER.

1. Under 6 *G.* 4. *c.* 16. *s.* 120., which authorises the discharge of a certificated bankrupt taken in execution for a debt provable under his commission, the Court has inci-

incidentally the power of staying, before judgment, proceedings against such a bankrupt for such a debt. *Sadler and Another* v. *S. and C. Cleaver.* *Page* 769

2. A second assignee, who continues by suggestion on the record a suit commenced by his predecessor, may under *s.* 67. 6 *G.* 4. *c.* 16. recover a penalty as well as his predecessor. *Bates* v. *Sturges.* 585

3. A testator left annuities of 20*l.* a year to two female servants: one of the devisees married during the testator's life, upon which, by a codicil, he left her annuity for her sole and separate use: the other having married after his death, and there being no such condition attached to her annuity, Held, that it passed to the assignees of her husband upon his becoming insolvent. *Caunt* v. *Ward.* 608

4. A second commission of bankrupt is void while a former one remains in force: to a replication in trespass, therefore, asserting title to goods under a first commission still in force, it is ill for a Defendant who claims under a second commission, to rejoin, that the goods were in the order and disposition of the Plaintiff by the permission of the assignee under the first commission, and that they passed to the Defendant by the assignment under the second. *Nelson* v. *Cherrell and Others.* 663

5. The wife of a convict sentenced to transportation, is liable to be made a bankrupt if she becomes a trader, although her husband remains in this country. *Ex parte Franks, in the Matter of Kezia Franks, a Bankrupt.* *Page* 762

BASTARDY BOND.

Debt on a bond voluntarily entered into by Defendant, the putative father of a bastard, to pay the Plaintiffs, parish officers, 2*s.* 6*d.* a week as long as the child should be provided for at the expense of the parish. Plea, that the Defendant was ready and willing to provide for the child, and requested the Plaintiffs to deliver the child to him, but that the child had been provided for by the Plaintiffs, as parish officers, of their own wrong:

Held ill. *Pope and Others* v. *Sale.* 477

BILL OF EXCHANGE.

See EVIDENCE, 4. FEME COVERT.

1. *H.* deposited with the Defendant as a security for goods sold, a bill accepted by Plaintiff, for which Plaintiff had received no value.

H. afterwards paid for the goods, and asked for the restoration of the bill; but the Defendant indorsed it for value to *G.* who sued the Plaintiff and recovered: Held,

That the Plaintiff might recover of the Defendant the amount of the bill in an action for money paid

paid to the use of Defendant, but not the costs of the action by *G.* against the Plaintiff. *Bleaden* v. *Charles.* *Page* 246

2. The acceptance was written on a bill of exchange before the bill was drawn. The declaration described the transaction in the usual order of time; the drawing first, and then the acceptance:

Held, no variance. *Molloy* v. *Delves.* 428

3. Where the holder of a bill of exchange seeks to recover against the indorser on default of the acceptor, the notice given to the indorser should state, expressly, or by necessary implication, that the bill has been dishonoured:

It is not sufficient to say that the holder looks to the indorser for payment. *Solarte and Others* v. *Palmer and Another.* 529

BOND.

By 43 *G.* 3. *c.* 99. the bond given to the commissioners by a collector of taxes is to be conditioned for demanding the taxes, enforcing the provisions of the act, and paying the sums collected to the receiver-general. The Defendant was sued on a bond which contained those conditions, and also a condition for accounting and paying to the commissioners: Held, that this latter condition might be rejected as surplusage, and did not avoid the bond. *Collins and Others* v. *Gwynne.* 423

BYE-LAW.

See CORPORATION, 1.

CARRIER, CASE AGAINST.

The owner of a ship, by an instrument called a charter-party, appointed *G. B.* to the command, and agreed that *G. B.* should be at liberty to receive on board a cargo of lawful goods (reserving 100 tons to be laden for account of the owner), and proceed therewith to *Calcutta*, and there reload the ship with a cargo of *East India* produce, and return therewith to *London*; and upon her arrival there and discharge, the intended voyage and service should end; and the owner further agreed, that a complement of thirty-five men should, if possible, be kept up; that he would supply the ship with stores, and that she might be retained in the said service twelve months, or so much longer as was necessary to complete the voyage; in consideration of which, *G. B.* agreed to take the command, and receive the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage, and pay to the owner for the use and hire of the ship after the rate of 25*s.* per ton per month, of which 1000*l.* was to be paid on the execution of the charter-party. And

And it was further agreed that *G. B.* should remit all freight bills for the homeward cargo to *B. B.* and Co. in *London*, who should hold them as joint trustees for the owner and *G. B.*: that they should be applied to payment of the balance of freight due from *G. B.*, and the surplus, if any, be handed over to him. It was then provided, that the owner should have an agent on board, who was to have the sole management of the ship's stores, and power to displace *G. B.* for breach of any covenant in the charter-party, and appoint another commander. *C.* and Co., in *Calcutta*, having knowledge of this instrument, shipped goods on board the vessel for *London*, which were never delivered there: Held, that they could not recover against the owner. *Newberry and Another* v. *Colvin and Another.* *Page* 190

CERTIFICATE.

See SURETY. BANKRUPT.

CHAMPERTY.

An agreement to communicate such information as shall enable a party to recover a sum of money by action, and to exert influence for procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, is illegal. *Stanley, Administratrix of T. Stanley*, v. *Jones.* 369

CHARITIES.

The subscribers who attend a committee for managing the concerns of a hospital, are liable to the creditors of the hospital. *Burls* v. *Smith.* *Page* 705

CHARTER-PARTY.

The lay days allowed by a charter-party for a ship's discharge are to be reckoned from the time of her arrival at the usual *place* of discharge, and not at the *port* merely, though she should for the purposes of navigation discharge some of her cargo at the entrance of the port, before arriving at the usual place of discharge. *Brereton and Others* v. *Chapman.* 559

CONDITION PRECEDENT.

See ASSUMPSIT, 1.

CONSTABLE.

See OFFICER, ACTION AGAINST, 1.

COPYHOLD.

See DEVISE, 2.

In settling the value of a copyhold fine, the tenant is not concluded by the amount of rent he may have reserved on the premises, but may shew their value to be less. *Lord Verulam* v. *Howard.* 327

CORPORATION.

Where, by charter, a select body in a corporation had power to make bye-laws for the good rule and government of the borough, letting of its lands, and *other matters and causes whatsoever concerning the borough*, and by the charter it was also directed that the mayor, bailiffs, and burgesses should, from time to time, elect other burgesses: Held, that the general body of mayor, bailiffs, and burgesses might make a bye-law that the burgesses should be elected by the select body. *Rex* v. *Westwood.* *Page* 1

COSTS.

See BILL OF EXCHANGE, 1.

1. Business done under a commission of bankruptcy, is not business in respect of which an attorney is compellable to deliver a bill a month before the action. *Hamilton* v. *Pitt and Others.* 232
2. The costs of a view cannot be allowed, unless the writ contain the name of a shewer appointed by the Defendant as well as by the Plaintiff. *Taylor* v. *Thompson.* 403
3. Though the Court will not set off probable costs against costs actually taxed, yet where the cause in which probable costs are expected is near decision, *semble*, they will suspend execution for the actual costs. *Masterman and Others* v. *Malin.* 435
4. 1. A successful party is entitled to the expense of a foreign witness material to his cause, although such witness be not accessible by subpœna.

   2. He is also entitled to the expense of detaining such witness in this country to await the trial of the cause, although opportunity is afforded of examination upon interrogatory. *Lonergan and Another* v. *Royal Exchange Assurance.* *Page* 731
5. Allowance may be made in costs for loss of time to a foreign witness, necessary to the success of the cause, who is not accessible by subpœna, and refuses to attend without compensation. *Same* v. *Same.* 736
6. In trover, a verdict was taken for Plaintiff to the full amount of the goods converted, the Plaintiff consenting to take them back in reduction of damages upon its being referred to an arbitrator by order of *nisi prius* to ascertain the amount of deterioration, which amount, with the costs in the cause, were to be paid to the Plaintiff: Held, that the expense of witnesses attending the arbitration were costs in the cause. *Tregoning* v. *Attenborough.* 733
7. Defendant being arrested for 500*l.* set up her coverture as a defence, and Plaintiff recovered only 38*l.* for money advanced after the death of her husband. Upon an application for costs under 43 *G.* 3. *c.* 46., the Plaintiff having deposed that he was ignorant of the coverture,

verture, Held, that to obtain the costs, Defendant was bound to shew that the Plaintiff knew of the coverture. *Spooner* v. *Danks.* *Page* 772

COVENANT.

1. Defendants chartered a ship to *New Zealand*, where they were to load her, or by an agent there to give Plaintiff, the owner, notice that they abandoned the adventure; in which case they were to pay him 500*l.* The ship went to *New Zealand*, but found neither agent nor cargo there, and the captain made a circuitous voyage home, by way of *Batavia*. This voyage, after making every allowance for increased expense and loss of time, was more profitable than the original adventure to *New Zealand* would have been.

Plaintiff having sued Defendant on the charter-party for breach of covenant, held, that he could not recover the 500*l.* penalty in addition to the profit of the homeward voyage. *Staniforth* v. *Lyall and Others.* 169

2. *L.* being seised in fee, demised to *B.* for twenty-one years from *June* 1814: *B.* demised to *M.* for twenty-one years from *June* 1814 wanting twenty-one days; and then by deed poll granted to *L.* the indenture of lease to *M.*, the premises thereby granted, and the rent reserved, to hold to *L.*, his executors, &c. for the term mentioned in the demise to *M.* *L.* by lease and release conveyed the premises, the reversion and reversions, rents, issues, and profits, and all his interest in fee to Plaintiff by way of mortgage: *M.* assigned his term to Defendants by way of mortgage, but Defendants never entered: Held, 1. that Plaintiff might sue Defendants on the covenants in *M.*'s lease; 2. that the deed poll from *B.* to *L.* did not merge the chattel interest in the fee, or suspend the right to sue on the lease to *M.*; 3. that the conveyance in fee from *L.* to Plaintiff passed the chattel interest created by *B.* as well as the fee. *Burton* v. *Barclay and Perkins.* *Page* 745

CUSTOM OF THE COUNTRY.

See LEASE, 1.

DAMAGES.

See DISTRESS.

DEMISE.

See LANDLORD AND TENANT, 2.

DEVISE.

1. Testator devised real property to the heir of Mrs. *R.* of *B.*, (who was living at his death,) and in case such heir should die without issue, to the next heir of Mrs. *R.*:

Held,

Held, that Mrs. *R.*'s eldest son took an estate tail in the property. *Carne and Mary his Wife* v. *Roche the younger.* *Page* 226

2. Since the statute *55 G. 3. c.* 192., a copyhold will pass under a general devise of real estate, although there be no surrender to the use of the will. *Doe d. Clarke* v. *Ludlam and Another.* 275

3. Devise of land to trustees, in trust to put *E. E.* in possession of them when she comes of age, and if she die during her minority, or without *issue*, in trust for *T. E.* But if *E. E.* attain twenty-one or marry, one third for the use of the first male issue of her body; one third for the use of the second male issue; and one third for the use of the third male issue; charged with an annuity for *E. E.* But if *E. E.* die without male issue, and leave female issue, for the use of the female issue and the heirs male of their bodies:

Held, that *E. E.* took an estate tail. *Permewan* v. *Mitchell and Wife and Another.* 351

4. Devise to *D.*, *L.*, *V.*, and *S.* (females), and in case any of them die, leaving a daughter or daughters, her share to go to such daughters in seniority; but if any of them, *D.*, *L.*, *V.*, and *S.*, should die without issue in the lifetime of *M. C. A.* and *W.*, the share of her and them so dying to go to *F.* and others in succession. All the rest and residue of the devisor's estates to go to *D.*:

Held, that *D.*, *L.*, *V.*, and *S.*, and their daughters took estates for life, and *D.* a remainder in fee in the whole. *Bennett* v. *Lowe.* *Page* 535

5. 1. An executor cannot take the residue of the testator's property for his own benefit, where the will contains a specific bequest to him for his care and trouble.

2. Parol evidence of a testator's declarations can only be received to shew what his intentions were at the time of making his will.

3. Such evidence of declarations in favour of giving the residue to the executor, cannot be received where the will contains a specific bequest to the executor. *Whitaker* v. *Tatham.* 628

6. Testator commenced his will as follows: — "As touching such worldly property wherewith it hath pleased God to bless me, I give, devise, and dispose of the same in manner following;" and, after various bequests and devises, concluded: "All the rest of my worldly goods, bonds, notes, book debts, and ready money, and every thing else I die possessed of, I give to my son *George*:"

Held, that *George* took a fee in lands of the testator not specifically devised by the will. *Wilce* v. *Wilce.* 664

DIES NON.

See PRACTICE, 1.

DIS-

DISTRESS.

See LANDLORD AND TENANT, 2. PLEADING, 5.

The Defendant wrongfully seized goods, and placed a man in possession of them for some days: Held, the owner might recover damages, although he had the use of the goods all the time. *Bayliss* v. *Fisher.* *Page* 153

EJECTMENT.

See PRACTICE, 2.

Ejectment. The Plaintiff proved twenty years' possession. The Defendant ten years following the twenty:

Held, that the Plaintiff was entitled to recover. *Doe d. Harding* v. *Cooke.* 346

EMBLEMENTS.

A lease having been granted on condition that if the lessee contracted a debt on which he should be sued to judgment which should be followed by execution, the lessor should re-enter as of his former estate, and the lessor having re-entered after a judgment and execution, Held, he was entitled to the emblements. *Davis and Others, Assignees of White, a Bankrupt,* v. *Eyton.* 154

ENCLOSURE ACT.

Plaintiff pleaded a right of common under an award of commissioners appointed by an enclosure act, which authorized them to award such rights in respect of certain messuages in *G.*, and gave an appeal in three months after the award, by feigned issue, and to the quarter sessions:

Held, that the limited time having elapsed, it was not necessary for him to shew the original right in respect of which the commissioners had given him the right in the award. *Phillips* v. *Maile.* *Page* 133

ERROR.

See PRACTICE, 18.

ESTATE PUR AUTRE VIE.

A rent-charge *pur autre vie*, if grantee dies living *cestui que vie*, goes to grantee's executor, though not named in the grant. *Bearpark* v. *Hutchinson and Mary his Wife.* 179

EVIDENCE.

See DEVISE, 5. WASTE.

1. Defendants, sued by a corporation for making, while directors, false entries in the books of the corporation, Held not entitled to inspect the books of the corporation; at all events, not without an affidavit that such inspection was necessary to their defence. *Imperial Gas Company* v. *Clarke and Others.* 95

2. Plaintiff demanded 40*l.* upon an agreement by Defendant, an incoming tenant, to pay for growing crops:

crops: the Defendant offered to pay 17*l.*: Held, no evidence to support a count upon an account stated. *Wayman* v. *Hilliard.* *Page* 100

3. A bankrupt cannot be called as a witness to explain an act which may defeat his commission. *Sayer, Assignee of Cort, Bankrupt,* v. *Garnett.* 102

4. *W.* drew a bill on the Defendant, to whom he had been sending goods for sale, and Defendant accepted the bill, neither party knowing the state of the account between them: it turned out that *W.* was at the time indebted to the Defendant.

W. lurking from his creditors at large, after an act of bankruptcy, indorsed the bill, upon importunity, to Plaintiff, one of his creditors with whom he was on friendly terms, and then became a bankrupt.

Plaintiff having sued Defendant on the bill, Held,

That *W.* was an admissible witness in the cause, and the jury having found for the Defendant, the Court refused to disturb the verdict. *Bagnall and Another* v. *Andrews.* 217

5. Where the question was, whether a slip of land between some old enclosures and the highway vested in the lord of the manor or the owner of the adjoining freehold, Held, that evidence might be received of acts of ownership by the lord of the manor on similar slips of land not adjoining his own freehold, in various parts of the manor. *Doe d. Barrett* v. *Kemp.* 332

6. Libel. The Plaintiff alleged that he carried on in an honest and lawful manner the trade of a manufacturer of bitters, and that the Defendant libelled him in his trade by publishing that the bitters were made to adulterate porter; *per quod* the Plaintiff was ruined:

Held, that under the general issue the Defendant might give in evidence that the Plaintiff's trade was illegal, and that his bitters had been condemned in the Court of Exchequer. *Manning* v. *Clement,* 362.

7. A party to the record is a competent witness, provided he be disinterested. *Worrall* v. *Jones, and Others,* 396.

8. A new trial having been granted, the Court allowed the Plaintiff to have inspection of a deed read in evidence by the Defendant at the first trial. *Hewitt* v. *Pigott.* *Page* 400

9. 1. A landlord who sued a sheriff for not reserving a year's rent on an execution against a tenant, released the rent after the jury were sworn, to make the tenant a witness:

Held, that he was not thereby precluded from recovering against the sheriff the amount of the rent.

2. The statute 11 *G.* 2. *c.* 19. which gives the landlord an action against the sheriff in such a case, applies to the case of lessee and under-tenant, as well as to the case of landlord and lessee. *Thurgood* v. *Richardson.* 428

10. A book in which the steward of a manor entered the fines assessed, as well those paid as those

unpaid, Held, not evidence for the lord of the manor to shew what fines had been paid, although the steward had received it from his predecessor, and it was accessible to all the tenants. *Dean and Chapter of Ely* v. *Caldecott.*

Page 433

11. Where a bankrupt made a payment to Defendant on the eve of bankruptcy, as *he* said, and as circumstances indicated, to benefit the Defendant, Held, that the assignee might recover the amount of the Defendant, notwithstanding the Defendant adduced evidence to shew that he had pressed for payment, and had threatened to arrest the bankrupt.

2. Notwithstanding such a threat, the motives and state of mind of the bankrupt at the time of payment may properly be left to the jury, upon a question whether the payment was voluntary or compulsory. *Cook and Another, Assignees of Baker, a Bankrupt,* v. *Rogers.* 438

12. The Plaintiffs sued in trover for goods, of which they alleged they had been deprived by fraud in the Defendants' agent: Held, that they might prove the contract made by the agent, without calling him as a witness, although the Defendants were not privy to the fraud. *Irving and Others* v. *Motly and Another.* 543

13. Plaintiff's witnesses alleged that Plaintiff bargained to give Plaintiff's colt for Defendant's mare and 10*l.*; and that Plaintiff's colt was not warranted.

Defendant's servant produced a receipt as follows, which he had drawn up when he paid the 10*l.*, some time after the bargain:

"Received 10*l.* for a colt warranted sound." This receipt was signed by the Plaintiff, an illiterate man: Held, that the receipt was not conclusive; and that it was properly left to the jury to find whether the warranty of the colt formed any part of the bargain, or was inserted in the receipt without authority, by an after-thought of the Defendant's servant. *Fairmaner* v. *Budd.* *Page* 574

14. Defendant agreed to convey on board his ship a *boat* for the Plaintiff, of certain dimensions. Plaintiff presented a *decked* boat, within the size agreed on:

Held, that evidence was properly received of a practice to take off the decks of such boats when they were stowed on board ships; and that the Plaintiff having declined to permit his deck to be removed, could not sue the Defendant for breach of agreement. *Haynes* v. *Holliday.* 587

15. The Defendant not denying an imputation that he had instigated a servant to steal a lease material to the determination of the Plaintiff's cause, the Court made absolute a rule for giving secondary evidence of its contents. *Doe d. Pearson* v. *Ries.* 724

EXCESSIVE DAMAGES.

See NEW TRIAL, 3.

EXECU-

EXECUTION.

Judgment of nonsuit was signed and execution sued out after a commission of bankrupt against Plaintiff; but the first day of the term, to which the judgment related, was anterior to the commission: Held, that the costs were not a debt provable under the commission, and that the Plaintiff was not entitled to set aside the execution. *Brough* v. *Adcock.* *Page* 650

EXECUTOR.

See DEVISE, 5.

EXTINGUISHMENT.

See COVENANT, 2.

FEIGNED ISSUE.

See PRACTICE, 15.

FEME-COVERT.

See BANKRUPT, 3. 5.

1. Held, that the indorsee might recover against the acceptor on a bill of exchange drawn and indorsed by a married woman, with the consent of her husband. *Prestwick and Another* v. *Marshall* 565
2. Defendant, a married woman, was arrested upon a bill of exchange which she had given for the education of children by a former husband. The Plaintiff having been apprised of the second marriage, the Court discharged the Defendant upon a summary application, although she had given out that she had property of her own, and that the bill would be duly paid. *Slater* v. *Mills.* *Page* 606

FINE AND RECOVERY.

See PRACTICE, 3.

1. Parties may insist on having the indentures of a fine made to agree with the concord, by the insertion of all limitations of legal estates contained in the concord. *Butt, Demandant; Noel and Wife, Deforciants* 338
2. Where the warrant of attorney and deed to lead the uses were executed in a name by which the vouchee was commonly known, the Court refused to amend the recovery by substituting a different name by which, as he afterwards discovered, he had been baptized. *Addis, Demandant; Norris, Tenant; Power, Vouchee.* 455

FOREIGN COURT, SENTENCE OF.

The sentence of a foreign court of admiralty is not conclusive as to the ground of condemnation, unless it be explicitly stated what the ground is: Held, that this did not appear on a sentence which stated "that the ship *George* had sailed from *Liverpool* knowing of

the blockade of *Buenos Ayres* by the Emperor of *Brazil*, from a short distance of which port she was taken, and for that reason ought to be considered as violating the blockade; besides which, it was notorious the captured had endeavoured to get goods into *Buenos Ayres*, as was clear from the evasive answers of the captain; that the captured had not the plausible excuse of going first to *Monte Video*, and thereby complying with the published instructions; from all which, and from what the documents stated, the ship was adjudged good prize. *Dalgleish and Others* v. *Hodgson*. *Page* 495

FORFEITURE.

See EMBLEMENTS, 1.

FRAUDULENT PREFERENCE.

See EVIDENCE, 11.

GAMING.

Held, that the Plaintiff though an indorsee for valuable consideration, could not recover on a bill given in payment of a bet above 100*l.* lost at a legal horse race. *Shillito* v. *Theed*. 405

GUARANTY.

Defendant guaranteed Plaintiffs against debts to be contracted by *L. M.* to the extent of 400*l.* — *L. M.* became indebted to Plaintiffs to the amount of 625*l.*, upon which, by a composition with his creditors, he paid them 8*s.* 7*d.* in the pound, leaving due to the Plaintiffs out of their whole claim 356*l.*

The Defendants being sued for that sum on their guaranty,

Held, that they were entitled to deduct from it 171*l.* 13*s.* 4*d.*, the amount of the dividend of 8*s.* 7*d.* in the pound upon 400*l.* *Bardwell and Others* v. *Lydall*. *Page* 489

INSURANCE.

See FOREIGN COURT, SENTENCE OF.

1. Plaintiff effected a policy of insurance against fire, with a condition that the Plaintiff should forfeit all benefit under the policy, if there were any fraud or false swearing in the claim he made.

A fire ensued, and the Plaintiff made affidavit of damage to the extent of 1085*l.* Having sued for the amount, and a jury having found a verdict for him, with only 500*l.* damages,

The Court granted a new trial. *Levy* v. *Baillie and Others*. 349

2. Policy on goods in *Java Packet* at and from *Sincapore*, *Penang*, *Malacca*, *Batavia*, all or any, to ship's port of discharge in *Europe*, with leave to touch, stay, and trade at all or any ports and places whatever and wheresoever in

in the *East Indies* or elsewhere, beginning the adventure upon the goods from the loading thereof on board, *as above;* with leave *in that voyage* to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, *in any direction*, and for any purpose, necessary or otherwise, particularly *Sincapore*, *Penang*, *Malacca*, and *Batavia*, *Cape of Good Hope*, and *St. Helena:* the ship took goods on board at *Batavia;* proceeded to *Sourabaya*, which is 400 miles to the eastward of *Batavia*, and directly out of the course from *Batavia*, *Sincapore*, *Penang*, or *Malacca*, to *Europe;* took goods on board at *Sourabaya;* returned to *Batavia;* and thence proceeded to *Europe:* Held, that the voyage performed was a voyage covered by the policy; that the proceeding to *Sourabaya* was no deviation; and that the goods put on board at *Sourabaya* were covered by the policy as well as those put on board at *Batavia*. *Leathly* v. *Hunter*. *Page* 517

INTEREST.

Held, that interest was not payable on the following instrument, given by the Defendants to the Plaintiff: — "We hereby undertake to pay you, agreeably to instructions from *J. W.*, the sum of 1262*l.* on his account, as soon as we shall have received from *R.* and *R.*, of *New South Wales*, the amount of monies in their hands belonging to *J. W.*, and now under attachment by you."

By the instructions from *J. W.*, the payment was to be taken in discharge of a bill of *J. W.*'s at nine months after date, in the hands of Plaintiff, and which Defendants were to receive from him on payment of the 1262*l.* *Hare* v. *Rickards and Another*. *Page* 254

JOINT STOCK COMPANY.

See CHARITIES.

Defendants consented to become directors, bought shares, and attended meetings of a projected water company, for which an act of parliament was to be obtained:

Having done no act to divest themselves of their interest in the concern,

Held, that though no act of parliament was obtained, and the project failed, they were responsible for works ordered at subsequent meetings of the projectors, which they did not attend. *Doubleday* v. *Muskett and Lousada*. 109

JUDGMENT.

See PRACTICE, 10.

A *nolle prosequi* as to part, entered up *after judgment* for the whole, is equivalent to a *retraxit*, and a

bar to any future action for the same cause. *Bowden* v. *Horne.* *Page* 716

LANDLORD AND TENANT.

See PLEADING, 5.

1. 1. The mere removal of goods by the tenant from premises demised, when rent is in arrear, is not, of itself, fraudulent as against the landlord; to justify the landlord in pursuing them, he must shew that they were removed with a view to elude a distress.

2. In replevin, where the verdict is for the Plaintiff, the Court will not grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the Plaintiff's risk of paying double costs. *Parry* v. *Duncan.* 243

2. A tenant entered under an agreement, containing stipulations for a lease at 25*l.* a year, and an engagement by the landlord to complete certain erections. The erections were never completed, and the tenant never paid any rent; but being called on after some years' occupation, said he was ready to pay what was due, provided the erections were completed, and an allowance made him for the expense of some repairs:

Held, that a demise at a rent certain could not be implied so as to entitle the landlord to distrain. *Regnart* v. *Porter and Another.* *Page* 451

LEASE.

1. If the lease contain no stipulations as to the mode of *quitting*, the off-going tenant is entitled to his 'way-going crop, according to the custom of the country, even though the terms of *holding* may be inconsistent with such a custom. *Holding* v. *Pigott.* 465

2. "*G. F.* does this day agree to let to *J. S.* three cottages for ten years; he further agrees to build a brewhouse and make a cellar; at the rent of 35*l.*: he agrees to pay the ground rent; and has this pay received 4*l.* from *J. S.* in earnest:"

Held, an actual demise, and not an agreement for a lease. *Staniforth* v. *Fox.* 590

LIBEL.

See EVIDENCE, 6.

LICENCE, PAROL.

Plaintiff's father, by oral licence, permitted Defendants to lower the bank of a river and make a weir above Plaintiff's mill, whereby less water than before flowed to Plaintiff's mill. Held, that Plaintiff could not sue Defendants for continuing the weir. *Liggins* v. *Inge and Another.* 682

MEMORANDA, 234, 774.

MERGER.

See COVENANT, 2.

MONEY LENT.

See ASSUMPSIT, 2.

MONEY PAID.

See BILL OF EXCHANGE, 1.

MORTGAGE.

See STAMP, 2.

The attorney for the mortgagee, who was also attorney for the mortgagor, having applied to the occupier of the land for rent to pay the interest of the mortgage with, and having threatened to distrain, Held, that the mortgagee could not treat the occupier as a trespasser, and eject him on a demise anterior to the application by his attorney as above. *Doe dem. Whitaker* v. *Hales.* *Page* 322

NEW TRIAL.

See PRACTICE, 14. LANDLORD AND TENANT, 1.

1. The Court will not grant a new trial, even on payment of costs, where the Defendant or his attorney having an opportunity of trying, permits a verdict to be taken against him as in an undefended cause. *Breach* v. *Casterton and Others.* *Page* 224

2. Where a Defendant omitted to appear at the trial in an action for *crim. con.* with his sister-in-law, and the jury gave more damages than were laid in the declaration, the Defendant assigning no good reason for not appearing to defend, the Court refused to grant a new trial on any terms. *Masters* v. *Barnwell.* 224

3. An importunate beggar having refused to quit the Defendant's premises, the Defendant ordered him to be apprehended by a constable, which was done, and he remained in custody one night at an inn; the next day he was brought again before the Defendant, who told him he might have two sovereigns or go before a magistrate; the beggar stipulated for something more to pay his charges at the inn; Defendant gave him half-a-crown and some refreshment, and the beggar departed. Having afterwards sued the Defendant for the imprisonment, and the jury having given 100*l.* damages, the Court granted a new trial. *Price* v. *Severn.* 316

4. The Court will not permit a party to move for a new trial on an objection to the applicability of evidence, unless the objection be taken before the Judge commences his summing up. *Abbott* v. *Parsons.* 563

NOL. PROS.

See JUDGMENT.

OFFICER, ACTION AGAINST.

Under a warrant against the goods of *A.*, the Defendant, an overseer, took goods already in the hands of the bailiff of *A.*'s landlord, as a distress for rent: Held, that the Defendant was not protected by the sixth section of 24 *G.* 2. *c.* 44. *Kay* v. *Grover and Another.* *Page* 312

PARTNERS.

See AGREEMENT, CONSTRUCTION OF.

PART OWNER.

A part owner of a ship is not necessarily a partner; therefore, a part owner, who as ship's husband incurs the expense of the outfit, may sue the other part owners separately for their respective shares of the expense. *Helme* v. *Smith.* 709

PAWNBROKERS' ACT.

A pawnbroker advanced 200*l.* to a trader in distress, upon a deposit of silks, and entered the transaction in his books as several advances, each of less than 10*l.*, but amounting in the whole to 200*l.*

The trader having become bankrupt, and his assignee having sued in trover for the silks, the Court refused to disturb a verdict found for the Plaintiff upon a direction to the jury to find whether the goods had been deposited on a contract to pay more than 5 per cent. interest. *Tregoning, Assignee of Innes and Another, Bankrupts,* v. *Attenborough.* *Page* 97

PAYMENT.

See GUARANTY, 1.

PLEADING.

See SLANDER. WASTE.

1. Slander. A count, after an inducement that one *J. P.* had become bankrupt, and that Plaintiff was about to prove a debt justly due under his commission, charged the Defendant with saying of the Plaintiff, in his trade of a livery stable keeper, and in a discourse touching the matter before mentioned, —

"He is a regular prover under bankruptcies;" meaning, that the Plaintiff was accustomed to prove fictitious debts under commissions:

Held ill, without a previous averment that the Defendant had been accustomed to employ the words in that sense. *Angle* v. *Alexander.* 119

2. The want of a precise allegation in an

an avowry, that the Plaintiff was tenant to the avowant, is not fatal, if it can otherwise be collected from the avowry that the Plaintiff was such tenant. *Innes* v. *Colquhon.* *Page* 265

3. In justification of an assault, the Defendants pleaded, that they were duly assembled as a select vestry, and extruded the Plaintiff, being an intruder. One of the select vestry having received no notice of the meeting, Held, that the justification was not made out. *Dobson* v. *Fussy and Others.* 305

4. In case for an injury to his reversion, the Plaintiff declared that the premises in question were in the occupation of *S. P.* as tenant to him: Held, that the allegation was sufficiently proved by shewing that *S. P.* had been let into possession by, and paid rent to, a *cestuique trust*, to whom Plaintiff was trustee. *Vallance* v. *Savage.* 595

5. 1. A plea under 11 *G.* 2. *c.* 19. *s.* 7., justifying the breaking open a lock to distrain cattle which have been fraudulently removed to elude a distress for rent, must aver that a constable was present when the lock was broken.

2. A plea of recaption upon a rescue must aver that the recaption was on fresh pursuit. *Rich* v. *Woolley and Others.* 651

POWER.

By marriage settlement the husband took an estate for life, with power of appointment to children; remainder to trustees to preserve, &c.; remainder to children in tail in default of appointment; remainder to husband in fee in default of issue.

The husband became bankrupt, conveyed in the usual way all his property by bargain and sale, to his assignees, and afterwards executed an appointment to his son in fee, after his own life estate. The assignees sold their interest to the bankrupt's mother:

Held, that the son took nothing under the appointment, but was entitled to an estate tail under the original settlement. *Badham and Sarah his Wife, late Sarah Mee, S. P. Mee, an Infant, and Others,* v. *Richard Mee, C. Mee, and J. Mee, and Others.* *Page* 695

PRACTICE.

1. A *sci. fa.* must lie four juridical days in the office; and *Holy Thursday* is not a juridical day, although the office be open upon paying an extra fee: *Scott* v. *Larkin.* 108

2. Under 1 *G.* 4. *c.* 87. *s.* 3. the Defendant in ejectment must give two additional sureties on bringing error, although he has before given two sureties on commencing the action. *Roe d. Durant* v. *Moore.* 124

3. An attorney of the great sessions in *Wales* is competent to take an acknowledgment on which a recovery may pass. *Davies, Demandant;*

such party will not be permitted to call witnesses nor to address the jury. *Wright and Another* v. *Wright.* *Page* 459

16. The Defendants being under agreement to pay the Plaintiffs the value of certain *billettes* issued to the Plaintiffs by the *Peruvian* government on a remonstrance by the *British* government, as a compensation for injury done to the Plaintiffs, Held, that the prothonotary was to estimate the value as the value of a bill of exchange for the same number of dollars on a house of respectability at *Lima*, although the *billettes* were at a great discount. *Delegal and Others* v. *Naylor.* 460

17. A new trial having been granted on the ground of the absence of a material witness, and upon condition of Defendant's paying money into Court, the Defendant was not permitted to take the money out of Court upon a suggestion that though the witness was now accessible, the Plaintiff had refused to answer, and was in contempt for not answering a bill in Chancery, filed by Defendant for a discovery, which would have been an answer to the action. *Jackson* v. *Hopkinson.* 557

18. Notwithstanding the statute 1 *W.* 4. *c.* 70. the Court will not stay execution issued after a writ of error on a judgment of nonsuit. *Keeling* v. *Austin.* 601

PRINCIPAL AND AGENT.

Semble, that by the usage of trade a ship-broker is not entitled to charge a ship-owner for his trouble in procuring a charterer for the ship, where the contract is not completed, though it be broken off by the owner. *Broad* v. *Thomas.* *Page* 99

RECEIPT.

See EVIDENCE, 13.

REGULÆ GENERALES.

555. 774. 782.

RELEASE.

See EVIDENCE, 9.

RENT CHARGE.

See ESTATE *pur autre vie.*

SELECT VESTRY.

See PLEADING, 3.

SHERIFF.

See TROVER, 1. TRESPASS.

SHIP BROKER.

See PRINCIPAL AND AGENT.

SHIP OWNER.

See CARRIER, CASE AGAINST. PART OWNER.

SLANDER.

See PLEADING, 1.

The Plaintiff alleged special damage from words spoken by the Defendant: Held, that this allegation could not be supported by proof that Defendant had spoken the words to *B.*, and that damage ensued in consequence of *B.*'s repeating them as the words of the Defendant. *Ward* v. *Weeks.* *Page* 211

STAMP.

See LEASE, 2.

1. A 3*l.* stamp is not sufficient on a lease reserving 370*l.* for house and land; and by a distinct reservation, 50*l.* for furniture and fixtures. *Coster* v. *Cowling.* 456
2. Upon a mortgage to *R.*, *A.*, and *B.* as a security for 365*l.* due from the mortgagor, no other sum being specified in the deed, Held, that a 4*l.* *ad valorem* stamp was sufficient, although the 365*l.* was made up of three separate debts due to *R.*, *A.*, and *B.* severally. *Reed and Others* v. *Wilmot and Another.* 577

STATUTE OF LIMITATIONS.

1. Where a written promise to pay a debt barred by the statute of limitations has been lost, oral evidence of the contents of the writing may be given.

2. Such a promise, if conditional, must be declared on as conditional, notwithstanding the 9 *G.* 4. *c.* 14., and notwithstanding it was given within six years from the time of contracting of the debt. *Haydon, Assignee of Sutton, a Bankrupt,* v. *Williams.* *Page* 163

SURETY.

A surety for a bankrupt is not discharged by the creditor's signing the bankrupt's certificate, even after notice from the surety not to do so. *Browne* v. *Carr and Others.* 508

SURRENDER.

See COVENANT, 2.

SUSPENSION.

See COVENANT, 2.

TENANT IN COMMON.

See PART OWNER.

TIME.

See ENCLOSURE ACT.

TRESPASS.

See LEASE, 1.

B. sued out execution against *A.* After seizure, and before sale, the execution was set aside by rule of K. B., of which the sheriff received notice from *A.* before the sale, and by the terms of the rule *A.* was to bring no action for the seizure. The sheriff having proceeded to a sale, on the ground that he had received no notice of the rule from *B.*, Held, that *A.* might sue *B.* in trespass for the sale. *Perkins* v. *Plympton.* *Page* 676

TROVER.

1. A sheriff's officer seized goods under a *fi. fa.*, and packed them up. The execution was afterwards abandoned, on an agreement that the Plaintiff in the action should receive goods for his demand instead of money. A portion of the goods, however, which had been seized, were afterwards sent by the under-sheriff's agent to the sheriff's officer to hold till the Plaintiff should pay him the expenses of the levy. The Plaintiff afterwards paid the officer, and the goods were forwarded to the Plaintiff: Held, a sufficient conversion to render the sheriff liable in trover to the assignees of the Defendant in the action, who had become bankrupt upon an act of bankruptcy committed before the execution. *Carlisle, Assignee of Leonard, a Bankrupt*, v. *Garland.* *Page* 298

2. The Defendant, a wharfinger, having acknowledged certain timber on his wharf to be the property of the Plaintiff, Held, that he could not dispute the Plaintiff's title in an action of trover, brought against him by the Plaintiff. *Gosling* v. *Birnie.* 339

USURY.

An annuity for four lives, with a covenant that the grantor should insure the principal sum within thirty days after the expiration of the third life, is not an usurious contract. *In the matter of Naish, Executrix of Stewart.* 150

VARIANCE.

See BILL OF EXCHANGE, 2. PLEADING, 4.

VENDOR AND PURCHASER.

1. Plaintiff placed in the hands of his agent *Neapolitan* bonds, with *coupons* or receipts for half-yearly interest payable to the bearer of the *coupon:* the *coupon* referred to a certificate which gave the holder the option of converting his

his bonds into funded debt: the interest was paid to holder of the *coupon* without production of the certificate, but the bonds were never sold in the market without the certificate: Plaintiff kept the certificates in his own hands, but his agent, without authority, and fraudulently, pledged the bonds to Defendant as a security for a debt: Held, that it was correctly left to the jury to determine whether these instruments passed by delivery, and whether Defendant had acted with due caution in receiving the *coupons* without requiring the certificate; the jury having found both questions in the negative, the Court refused to set aside a verdict for Plaintiff. *Lang* v. *Smyth.* *Page* 284

2. 1. In assumpsit to recover money deposited upon purchase, upon an allegation that the Defendant has failed to make a proper title, this Court will not consider whether the title is of a doubtful description, such as a court of equity would not compel an unwilling purchaser to take, but simply whether the Defendant has or has not a legal title to convey.

2. *S. P.*, who had a life interest in some funded property, and in a leasehold house, with reversion to her son, joined with her son in assigning the property to the Defendant, "to hold, receive, and take the leasehold, funds, and other premises, to the Defendant upon trust that he should receive, and convert the same into money; and for that purpose should, at his own discretion, sell the leasehold, and the *reversionary* interest in the funds; provided that he should not, during five years from the date of the deed, put in force the trusts declared of the premises in such manner as to deprive *S. P.* of her life-interest therein during that period:" Held, that at the end of the five years, the Defendant had power to sell *S. P.*'s life interest in the funds. *Boyman* v. *Gutch.* *Page* 379

VERDICT.

See ACTION ON THE CASE FOR DECEIT, 2.

WARRANTY.

1. Defendant warranted sound wind and limb *at the time of the bargain*, and sold for 90*l.*, a race-horse which had broken down in training, and was affected with a splint; circumstances which were disclosed to the Plaintiff, and but for which the horse would have been worth 500*l.*: Held, that this warranty did not import that the horse was fit for the purposes of an ordinary horse:

2. The warranty being restricted to the time of the bargain, *semble*, the Plaintiff could not sue in respect of the horse breaking down afterwards.

3. De-

3. Defects apparent at the time of a warranty, are not included in it. *Margetson* v. *Wright*, *Page* 603

WASTE.

1. In an action of waste for ploughing ancient meadow, the Defendant cannot under the general issue, *nul wast*, give evidence that the ploughing was resorted to according to the custom of the country, for the purpose of ameliorating the meadow. If such matter be a defence at all, it must be pleaded.

2. In an action of waste for cutting timber, the Defendant cannot give in evidence, even in mitigation of damages, that the timber was cut for the purpose of necessary repairs, but turning out to be unfit for that purpose, was exchanged for other timber, which was applied to the repairs. *Simmons* v. *Norton*. *Page* 640

WELSH ATTORNEY.

See PRACTICE, 3.

WILL.

A will of lands, subscribed by three witnesses in the presence and at the request of the testator, is sufficiently attested, although none of the witnesses saw the testator's signature, and only one of them knew what the paper was. *Wright and Another* v. *Wright*. 457

WITNESSES.

See COSTS, 5.

END OF VOL. VII.

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